

Human Rights

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I. Global Climate Change

In 2008, with more information coming to light proving that climate change seriously threatens the ability of people to obtain adequate food, water, and shelter, the human rights community addressed the connection between climate change and universally recognized human rights.

After the Conference of the Parties to the U.N. Framework Convention on Climate Change and its Kyoto Protocol in Bali, Indonesia (Bali Conference) in 2007, Ms. Kyung-wha Kang, U.N. Deputy High Commissioner for Human Rights, addressed the need to discuss the environment using a human rights perspective.³ Ms. Kang argued that a human rights perspective would make governments accountable for their citizens' vulnerability to global warming.

The Bali Conference adopted the "Bali Action Plan" to chart a new negotiation process to tackle global warming and its effects.⁴ The Bali Action Plan, which set up the Ad Hoc Working Group on Long-term Cooperative Action to carry out its goals by 2009, includes funding methods, technology transfer, and methods to reduce deforestation emissions.⁵

On February 19, 2008, at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities in Geneva (Geneva Conference), Ms. Kang urgently stressed the need for a human rights perspective.⁶ She identified research indicating that global warming and extreme weather conditions may be leading factors

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3. Conference of the Parties to the United Nations Framework Convention on Climate Change and its Kyoto Protocol, Bali, Indon., Dec. 3-14, 2007, *Climate Change and Human Rights*, Address by Ms. Kyung-wha Kang, U.N. Deputy High Commissioner for Human Rights, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/013DC0FAA475EC87C12573B10074796A?opendocument>.

4. U.N. Framework Convention on Climate Change, Bali, Indon. Dec. 3-15, 2007, *Report on the Conference to the Parties 3-6*, U.N. Doc. FCCC/CP/2007/6/Add.1, available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>.

5. *Id.* at 5.

6. Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, Climate Change, Migration, and Human Rights, Geneva, Switz., Feb. 19, 2008, *Climate Change and Human Rights*, Address by Ms. Kyung-wha Kang, U.N. Deputy High Commissioner for Human Rights, Address at the available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/BA5B630BFFAD7FC1C12573F600386398?opendocument>.

that trigger hunger, malnutrition, lack of access to water and adequate housing, exposure to disease, loss of livelihood, and permanent displacement. Focusing on those most vulnerable climate change effects, Ms. Kang pointed to the Stern Review Report on the Economics of Climate Change, Part II: Impacts of Climate Change on Growth and Development (Stern Report),⁷ which predicts that by 2050 millions of people may become permanently displaced due to rising sea levels, floods, droughts, hurricanes, and famine.

Recognition of the connection between climate change and human rights came full circle at the close of the 38th Annual General Assembly of the Organization of American States in Medellin, Colombia. Representatives welcomed the adoption of the Bali Action Plan, recognized that human beings are at the center of concern for sustainable development, that the world's poor are especially vulnerable to the effects of climate change, and approved "Resolution 7/23" which called for a study on the subject.⁸ Resolution 7/23 stated that climate change poses an immediate and far-reaching threat to people and communities with implications for the full enjoyment of human rights. The resolution stated that global warming is unequivocal and due greatly to human activity. The resolution called for the Inter-American Commission on Human Rights and the Department of Sustainable Development to contribute to efforts to determine the links between climate change and human rights.

II. Human Trafficking

A. EUROPE

The Council of Europe⁹ Convention on Action Against Trafficking in Humans entered into force on February 1, 2008, and as of November 17, 2008, nineteen European countries had ratified the Convention.¹⁰ Though other international instruments deal with human trafficking, this is "the first legally binding European instrument on [the] issue" of human trafficking.¹¹ The Convention is distinct from other instruments because its "scope takes in all forms of trafficking" and it was created "in particular with a view to victim protection measures and international cooperation."¹²

As Europe came together this year to fight human trafficking under the Convention, the Norwegian government focused on legislation within its own borders. The Norwe-

7. NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* (Cambridge University Press 2007), available at http://www.hm-treasury.gov.uk/stern_review_report.htm.

8. Human Rights and Climate Change in the Americas, AG/RES. 2429 (XXXVIII-O/08) (June 3, 2008), available at <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp>.

9. An organization formed in 1949 by ten European states to promote human rights, democracy, and the rule of law in Europe. The Council of Europe currently has 47 member states. See Council of Europe, About the Council of Europe, http://www.coe.int/T/e/Com/about_coe/ (last updated Jan. 3, 2008).

10. Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, France, Georgia, Latvia, Malta, Moldova, Montenegro, Norway, Poland, Portugal, Romania, and Slovakia. See Council of Europe, Chart of Signature and Ratifications for Convention Against Trafficking in Human Beings, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=11/20/2008&CL=ENG> (last updated Nov. 20, 2008).

11. International Trade Union Confederation, ITUC and ETUC Welcome European Convention Against Human Trafficking, Jan. 30 2008, <http://www.ituc-csi.org/spip.php?article1782>.

12. See Convention on Action Against Trafficking in Human Beings, Explanatory Report § (I)(a)(37), C.E.T.S. No. 197, May 16, 2005, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.

gian parliament is considering a new law that penalizes men who buy sex (instead of penalizing prostitutes), attempting to reduce the demand for prostitution.¹³ Norway hopes to follow Sweden, where prostitution and trafficking were reduced after it passed a similar law in 1999.¹⁴

B. SOUTHERN AFRICA

Government leaders and policy makers from southern Africa met in April 2008 to address the need for greater protections for regional human trafficking victims,¹⁵ who are particularly vulnerable because they often find themselves “enslaved in situations where their documents are confiscated . . . where their families are threatened with harm . . . and where they are bonded by a debt that they have little or no chance of ever repaying.”¹⁶ As the first conference in Africa aimed at protecting trafficking victims, the meeting sought to raise awareness among government officials and identify policies that countries could implement to ensure victim protection.¹⁷

In April 2008, Mozambique became the first southern African country to pass anti-trafficking legislation when it enacted a bill “containing specific provisions on prosecution, protection, and prevention.”¹⁸ Mozambique, like other African countries, is both “a source and a destination country” for human trafficking¹⁹ and the new law was a promising step forward in a region that had previously done little to combat either internal or cross-border trafficking.²⁰

C. SOUTHEAST ASIA

Leaders of China, Cambodia, Laos, Myanmar, Thailand, and Vietnam signed the Joint Declaration of the Coordinated Mekong Ministerial Initiative Against Human Trafficking (COMMIT Declaration) on December 14, 2007.²¹ The region is widely known as a hot-

13. Sabine Rappiger, *Europe Reconsiders Prostitution as Sex Trafficking Booms*, DEUTSCHE WELLE, Apr. 28, 2008, <http://www.dw-world.de/dw/article/0,2144,3283530,00.html>.

14. Lag om förbud mot köp av sexuella tjänster (Svensk författningssamling [SFS] 1998:408) (Swed.). See also *Policing Prostitution: The Oldest Conundrum*, THE ECONOMIST, Oct. 30, 2008, http://www.economist.com/world/international/displaystory.cfm?story_id=12516582.

15. The leaders met as part of the Migration Dialogue for Southern Africa hosted by the International Organization for Migration (“IOM”) and the Southern African Migration Project (SAMP). See Human Trafficking.org, Protecting Victims of Human Trafficking in Southern Africa, June 3, 2008, <http://www.humantrafficking.org/updates/777>.

16. African Press Organization, Protecting Victims of Human Trafficking in Southern Africa, Apr. 22, 2008, <http://appablog.wordpress.com/2008/04/22/south-africa-protecting-victims-of-human-trafficking-in-southern-africa/>.

17. *Id.*

18. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2008 188 (June 4, 2008), <http://www.state.gov/documents/organization/105501.pdf>.

19. U.S. Agency for Int’l Dev., Case Study: New Law Targets Trafficking in Mozambique, http://www.usaid.gov/our_work/cross-cutting_programs/wid/trafficking/cs_law.html (last updated Sep. 1, 2008).

20. African Press Organization, *supra* note 16.

21. Coordinated Mekong Ministerial Initiative Against Trafficking, Joint Declaration of the Coordinated Mekong Ministerial Initiative Against Human Trafficking, Dec. 14, 2007, available at http://www.no-trafficking.org/content/commit_process/commit_pdf/Joint%20Declaration%20Signed%20in%20Beijing%2014%20Dec%2007.pdf [hereinafter COMMIT Declaration].

bed of human trafficking,²² and the Declaration was “aimed at identifying and protecting trafficked persons at every point in the trafficking cycle, and to ensure that all official actions with respect to trafficked persons protect their safety, dignity and rights.”²³ The COMMIT Declaration implemented a zero tolerance policy “for any public sector complicity or involvement in the crime of trafficking in persons.”²⁴ Through implementing a two-year Plan of Action, the Declaration sought to consolidate the “significant” regional advances made to combat trafficking.²⁵

D. UNITED STATES

The Trafficking in Persons Accountability Act (Accountability Act) passed a U.S. Senate vote on October 1, 2008 and awaits approval by the U.S. House of Representatives.²⁶ Currently, the U.S. government can only prosecute trafficking crimes that occur within U.S. territory.²⁷ If the bill passes, U.S. courts will have jurisdiction when the alleged offender or victim is a U.S. citizen or lawful resident, regardless of where the crime occurred.²⁸ The Act would also allow for jurisdiction over any offender present in the U.S. regardless of the offender’s or victim’s nationality.²⁹

California is a major U.S. destination for trafficking victims.³⁰ On September 27, 2008, Governor Schwarzenegger signed two bills to reduce human trafficking in California. The first creates a pilot program in Alameda County to counsel and treat underage trafficking victims.³¹ The second permits trafficking victims to request that their names be kept out of the public record and requires that law enforcement diligently identify trafficking victims regardless of citizenship.³²

E. LATIN AMERICA

Human trafficking increased in Latin America because of lightly controlled borders and increased sex tourism in the region.³³ In 2008, the U.N. Office on Drugs and Crime

22. *Mekong Countries Coordinate to Tackle Scourge of Human Trafficking*, PEOPLE’S DAILY ONLINE, Dec. 12, 2007, <http://english.peopledaily.com.cn/90001/90777/6319888.html>.

23. *Mekong Nations Sign Joint Declaration Against Human Trafficking*, PEOPLE’S DAILY ONLINE, Dec. 15, 2007, <http://english.peopledaily.com.cn/90001/90776/6321364.html>.

24. COMMIT Declaration, *supra* note 21, ¶ 19.

25. COMMIT Declaration, *supra* note 21, ¶ 13.

26. Current status is available at Open Congress, Trafficking in Persons Accountability Act of 2007, <http://www.opencongress.org/bill/110-s1703/show> (last visited Mar. 6, 2008).

27. 154 Cong. Rec. S10,389 (daily ed. Oct. 1, 2008) (statement of Sen. Richard Durbin).

28. Trafficking in Persons Accountability Act of 2008, S. 1703, 110th Cong. (as passed by Senate, Oct. 1, 2008).

29. *Id.*

30. California Alliance to Combat Trafficking and Slavery, Human Trafficking in California Fact Sheet, available at http://safestate.org/documents/Fact_Sheet_Human_Trafficking_in_California.pdf (last visited Mar. 6, 2009).

31. CAL. WELF. & INST. CODE § 18259 (West 2008); see also A.B. 499, 2007–08 Leg., Reg. Sess. (Ca. 2008).

32. CAL. GOV’T CODE § 6254 (West 2008); Cal. Penal Code §§ 293, 236.2 (West 2008).

33. Andy Footner, *Paraguay’s Traffic Hub Imperils Female Teens*, WOMEN’S ENEWS, Jan. 1, 2008, <http://www.womensenews.org/article.cfm?aid=3451>.

(UNODC) began assisting specialized anti-trafficking units in Central America,³⁴ enabling prosecutors and police forces, especially in remote border areas, to more readily identify and handle transnational human trafficking situations.³⁵ UNODC began conducting a regional assessment to identify “strengths, weaknesses, opportunities, and threats (SWOT) of public prosecutors’ offices and national police bodies” regarding trafficking in persons. The assessment results were intended to help design training courses offered to police and prosecutors at the regional and national level over the next two years.³⁶

F. UNITED NATIONS

In August 2008, Joy Ngozi Ezeilo, a Nigerian professor and human rights lawyer, assumed the role of Special Rapporteur on Trafficking in Persons, Especially Women and Children, a position created in 2004.³⁷ Professor Ezeilo takes over from Sigma Huda of Bangladesh—the first trafficking Special Rapporteur since the position was created in 2004. As Special Rapporteur, Professor Ezeilo will focus on “protecting the human rights of actual or potential victims of trafficking.” She is authorized to visit countries and formulate recommendations to protect victims, and she must annually report on her activities to the U.N. High Commissioner for Human Rights.

III. International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY) began 2008 with the appointment of a new prosecutor, Serge Brammertz, who is the former Deputy Prosecutor of the International Criminal Court (ICC). He replaced Carla Del Ponte, who retired from the ICTY after eight years.

The most significant ICTY event in 2008 was the arrest of Radovan Karadzic, former Bosnian Serb politician and President of the Republika Srpska. The ICTY has indicted Mr. Karadzic twice for genocide, crimes against humanity, and war crimes.³⁸ Notoriously, Mr. Karadzic is charged with genocide in connection with the Srebrenica massacre where thousands of Bosnian Muslim men and boys were brutally murdered.³⁹

Mr. Karadzic was arrested in Belgrade on July 21, 2008, after thirteen years at large⁴⁰ and was transferred to The Hague on July 30, 2008. His first court appearance was on

34. UNODC Strengthens Anti-Trafficking Efforts, United Nations Office on Drugs and Crime, Sept. 18, 2008, <http://www.unodc.org/unodc/en/frontpage/unodc-strengthens-anti-trafficking-units.html>.

35. *Id.*

36. *Id.*

37. Office of the United State High Commissioner for Human Rights, Special Rapporteur in Trafficking in Persons, Especially Women and Children, <http://www2.ohchr.org/english/issues/trafficking/index.htm> (last visited Nov. 5, 2008).

38. Prosecutor v. Karadzic, Case IT-95-5/18-I, Motion to Amend the First Amended Indictment (Sept. 22, 2008), available at <http://www.un.org/icty/indictment/english/kar-mai080922e.pdf>.

39. Bosnia: Karadzic Arrest a Blow Against Impunity, Human Rights Watch, July 21, 2008, <http://www.hrw.org/english/docs/2008/07/21/bosher19421.htm>.

40. Top war crimes fugitive Karadzic arrested-Serbia, Reuters, July 21, 2008, http://www.reuters.com/article/homepageCrisis/idUSL21964587.CH_2400

July 31, 2008. The trial has been progressing slowly, and trial judge Iain Bonomy has expressed frustration with the prosecution's sluggish pace.⁴¹

Mr. Karadzic's arrest may have a strong political impact on Serbia. The arrest came when the European Union (EU) was preparing to ratify an association agreement with Belgrade. Serbian authorities were aware that before the agreement could be ratified, Belgrade would have to cooperate fully with the ICTY, meaning that it must arrest and surrender fugitives.⁴² In September 2008, European Commission President Barroso said that Serbia could be granted the status of EU candidate country in 2009, but the EU would wait for Prosecutor Brammertz's report on Serbia's level of cooperation with the ICTY.⁴³ With Ratko Mladic and Goran Hadzic still at large, it is unclear if the EU will consider Serbia's cooperation to be full.⁴⁴

Foreshadowing Mr. Karadzic's long-awaited apprehension was the arrest of Stojan Zupljanin in June, also near Belgrade.⁴⁵ Mr. Zupljanin was the most senior police officer in the area formerly known as the "Autonomous Region of Krajina" (ARK) in northwestern Bosnia during the war.⁴⁶ Allegedly he had operational control over the police forces responsible for many of the most notorious detention camps in the region.⁴⁷

Following years of delay, the trial of controversial Croatian General Ante Gotovina began in March 2008. As the overall operations commander of "Operation Storm," General Gotovina was charged with knowingly allowing killings, persecutions, and other inhumane acts against Serbs at the hands of the Croatian military during the 1995 retaking of the Krajina region.⁴⁸ Some Croatians still consider General Gotovina a war hero.

Naser Oric, the highly controversial former senior commander of Bosnian Muslim forces in Eastern Bosnia, was acquitted this year when the Appeals Chamber overturned his convictions⁴⁹ in connection with the torture and killing of Bosnian Serbs in the Srebrenica region. The Appeals Chamber found that the Trial Chamber had failed to make all the findings necessary to justify the conclusion that Mr. Oric was responsible for the actions of his subordinates.⁵⁰

41. Simon Jennings, *Judge Fumes at Slow Preparation for Karadzic Trial*, INSTITUTE FOR WAR & PEACE REPORTING, Oct. 31, 2008, http://www.iwpr.net/?p=tri&s=f&o=347556&apc_state=onpri.

42. Human Rights Watch Bosnia, *Karadzic Arrest a Blow Against Impunity*, July 21, 2008, available at <http://www.hrw.org/english/docs/2008/07/21/bosher19421.htm>.

43. David Brunnstrom, *Candidate status for Serbia possible in 2009*, REUTERS, Sept. 3, 2008, available at <http://www.reuters.com/article/idUSL3448742>.

44. U.N. Gen. Assembly Sec. Council, *Fifteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. A/63/210-S/2008/515 (Aug. 4, 2008), at 3.

45. Ivana Sekuralac and Dina Kyriakidou, *Serbia arrests top Bosnian Serb War Crimes Suspect*, REUTERS, June 11, 2008, available at <http://www.reuters.com/article/latestCrisis/idUSL11695578>.

46. Press Release, International Criminal Tribunal for the Former Yugoslavia, Stojan Zupljanin in Tribunal's Custody (June 21, 2008), available at <http://www.un.org/icty/latest-e/index.htm>.

47. Prosecutor v. Zupljanin, Case No. IT-08-91-PT, Amended Indictment, (May 17, 2008), available at <http://www.un.org/icty/indictment/english/zup-ai991216.htm>.

48. Prosecutor v. Gotovina, Cermak, and Markac, Case No. IT-06-90, Amended Joinder Indictment, (March 12, 2008), available at <http://www.un.org/icty/indictment/english/got-coramdjoind080312e.pdf>.

49. Prosecutor v. Oric, Case No. IT-03-68, Appeals Judgment, (July 3, 2008), available at: http://www.un.org/icty/oric/appeal/judgement/oric_jud080703.pdf.

50. *Id.*

IV. International Criminal Tribunal for Rwanda

Trials for the International Criminal Tribunal for Rwanda (ICTR) are to be completed by December 2008, and all appeals are to be finalized by 2010.⁵¹ In 2008, twenty-nine cases were tried, nine detainees awaited trial, and thirteen indicted persons have not yet been captured.⁵² The ICTR refused to transfer detainees to Rwanda, citing a lack of sufficient legal safeguards.⁵³ Thousands of lower-level suspects were already tried in Rwanda; either in regular national courts or in the traditional Gacaca courts.⁵⁴ Although the ICTR refused to transfer cases, Rwanda signed an agreement with the United Nations to allow ICTR convicts to serve their sentences in Rwanda, making it the seventh nation to do so.⁵⁵

Defense investigator Leonidas Nshogoza was charged with contempt of the ICTR for allegedly procuring false evidence to aid the appeal of Jean de Dieu Kamuhanda.⁵⁶ He turned himself in and pleaded not guilty. The trial began on February 9, 2009.⁵⁷

In March 2008, the Appeals Chamber increased the sentence of Athanase Seromba, a Rwandan priest convicted of genocide, from fifteen years to life imprisonment.⁵⁸

The trial of politician Callixte Kalimanzira also began in May of 2008. Prosecutor Christine Graham told the court that the prosecution would present evidence to establish "that the accused wielded power, authority and influence which he consistently abused during the 1994 genocide in Rwanda."⁵⁹

Ephrem Setako's trial began on August 25, 2008. As a former colonel of the Rwandan Armed Forces (FAR), he was a high-level military commander. In its opening statement, the prosecution stated that twenty-five witnesses would "testify and prove beyond reasonable doubt that the accused was one of the principal planners and executors of the genocide in Rwanda in 1994."⁶⁰

Later that month, the Appeals Chamber reversed former army lieutenant colonel Tharcisse Muvunyi's conviction,⁶¹ quashed his twenty-five year sentence, and ordered a

51. U.N. Sec. Council, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/2008/322 (May 1, 2008).

52. International Criminal Tribunal for Rwanda, *Status of Cases* (Oct. 10, 2008), <http://69.94.11.53/default.htm> (last visited Nov. 2, 2008).

53. Arther Asimwe, *End of Genocide Tribunal Stirs Emotions in Rwanda*, REUTERS, Jan. 27, 2008, available at <http://www.reuters.com/article/worldNews/idUSL2765872520080127>.

54. See Human Rights Watch, *Law and Reality: Progress and Judicial Reform in Rwanda*, July 25, 2008, <http://hrw.org/reports/2008/rwanda0708/rwanda0708web.pdf>.

55. Press Release, International Criminal Tribunal for Rwanda, *Rwanda Signs Agreement on Enforcement of ICTR Sentences* (Mar. 5, 2008), available at <http://69.94.11.53/default.htm>.

56. Press Release, International Criminal Tribunal for Rwanda, *Leonidas Nshogoza Pleads Not Guilty* (Feb. 12, 2008), available at <http://69.94.11.53/ENGLISH/PRESSREL/2008/549.htm>.

57. Prosecutor v. Nshogoza, Case No. ICTR-2007-91, Pre-Trial Conference Minutes of Proceedings (Oct. 22, 2008), available at http://69.94.11.53/ENGLISH/cases/Nshogoza/minutes/2008/081022_pretrial.pdf.

58. Prosecutor v. Seromba, Case No. ICTR-01-66, Judgment on Appeal (Mar. 12, 2008), available at <http://69.94.11.53/default.htm>.

59. Press Release, International Criminal Tribunal for Rwanda, *Kalimanzira Trial Begins* (May 5, 2008), available at <http://69.94.11.53/default.htm>.

60. Press Release, International Criminal Tribunal for Rwanda, *Trial of Ephrem Setako Begins* (Aug. 26, 2008), available at <http://www.unictr.org/ENGLISH/PRESSREL/2008/569.html>.

61. Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Appeal Judgment (Aug. 29, 2008), available at <http://www.unhcr.org/refworld/docid/48f356e42.html>.

retrial on the incitement to commit genocide charge based on a speech he gave at the Gikore Trade Center.⁶² Mr. Muvunyi was to remain in custody pending retrial.⁶³

In September, Simeon Nchamihigo, a former District Attorney of the Cyangugu prefecture, was sentenced to life imprisonment⁶⁴ for ordering the Interahamwe to kill Tutsis and for substantially contributing to the massacres of Tutsis seeking refuge.

V. African Court of Justice and Human Rights

In June 2008 at the 11th African Union Summit held in Sharm El-Sheikh, Egypt the African Union (AU) adopted the Protocol on the Statute of the African Court of Justice and Human Rights. The Protocol is designed to merge the African Court of Human Rights and the African Court of Justice into one institution—the African Court of Justice and Human Rights. The new institution is meant to complement the African Commission on Human and Peoples' Rights, which was founded under the African Charter on Human and Peoples' Rights.

The Protocol replaced the 1998 and 2003 Protocols relating to the African Court of Human Rights and the African Court of Justice.⁶⁵ It will enter into force thirty days after fifteen member states sign.⁶⁶

The African Court of Justice and Human Rights will become the main judicial organ of the African Union.⁶⁷ It will have sixteen judges, each from a different state.⁶⁸ Each region will have three judges, except the western region, which will have four.⁶⁹ The Protocol calls for judges with "high moral character" and for there to be "equitable gender representation" on the panel.⁷⁰

The Court will have two sections: one addressing general affairs, and one addressing human rights.⁷¹ The general affairs section will hear cases arising under Protocol Article 28, which provides jurisdiction in cases involving the interpretation and application of the Constitutive Act, other treaties involving the African Union, African Charter, any question of international law, union decisions, and state parties breaches.⁷² The human rights section may hear cases related to human rights or peoples' rights.⁷³ States parties, the

62. *Id.*

63. Press Release, International Criminal Tribunal for Rwanda, Tharcisse Muvunyi Appeal Judgement: New Trial Ordered on the Charge of Direct and Public Incitement to Commit Genocide and All Remaining Convictions Reversed (Aug. 29, 2008), *available at* <http://69.94.11.53/default.htm>.

64. Prosecutor v. Nchamihigo, Case No. ICTR-01-63, Summary of Judgment (Sept. 24, 2008), *available at* http://69.94.11.53/ENGLISH/cases/Nshamihigo/judgement/080924e_summary.pdf.

65. Protocol on the Statute of the African Court of Justice and Human Rights, art. 1, The African Union, Feb. 2, 2009, <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%2020EN.pdf>.

66. *Id.* art. 9 § 1.

67. *Id.* at ch. 3, art. 2 § 1.

68. *Id.* at ch. 3, art. 3 § 1-2.

69. *Id.* at ch. 3, art. 3 § 3.

70. *Id.* at ch. 2, art. 4, art. 5 § 2.

71. *Id.* at ch. 3, art. 16.

72. *Id.* at ch. 3, art. 16, 28.

73. *Id.* at ch. 3, art. 17.

Assembly, the Pan African Parliament, and other organs of the African Union may submit cases to the Court under Article 28.⁷⁴

The Court may hear complaints from NGOs and individuals if the state party concerned gives the Court jurisdiction. Only two state parties have thus far given such jurisdiction to the Court.

Other notable characteristics of the protocol include: public hearings unless the court or parties object;⁷⁵ a requirement of a majority vote for court decisions;⁷⁶ a requirement that judgments state reasons for the decision along with the names of judges who took part;⁷⁷ the ability for judges to dissent;⁷⁸ a provision requiring judgments to be binding and the ability to sanction noncompliant parties;⁷⁹ the lack of appellate review; the ability of the court to give an advisory opinion on any legal matter;⁸⁰ and the restriction of full-time court membership to the President and Deputy President. Also, a member state interested in a decision may intervene in a case.⁸¹ If the desire for intervention is based on the interpretation of the Constitutive Act or other treaties ratified by member states not in the dispute, every state of the Union must be notified and may intervene.⁸² The Protocol may be amended by a simple majority of the Assembly.⁸³ However, only the court or states parties may propose amendments.⁸⁴

VI. Capital Punishment

A. THE UNITED STATES

In 2008, the U.S. Supreme Court and lower federal courts addressed several significant death penalty issues, involving jury selection, procedural safeguards, sentencing criteria, and execution methods.

The Court considered a challenge to the prosecution's peremptory strike of prospective jurors based on race. In *Snyder v. Louisiana*,⁸⁵ the Court held that the trial judge committed clear error in rejecting a *Batson*⁸⁶ challenge to the prosecution's highly implausible rationale for excluding all black jurors. One black juror was dismissed because the prosecution feared that his nervousness over his student-teaching obligation would incline him to vote against the death penalty to avoid long deliberations.⁸⁷

74. *Id.* at ch. 3, art. 29 §1(a), (b).

75. *Id.* at ch. 4, art. 39.

76. *Id.* at ch. 4, art. 41 § 1.

77. *Id.* at ch. 4, art. 41 §§ 2-3.

78. *Id.* at ch. 4, art. 44.

79. *Id.* at ch. 4, art. 46.

80. *Id.* at ch. 4, art. 53.

81. *Id.* at ch. 4, art. 49.

82. *Id.* at ch. 4, art. 50.

83. *Id.* at ch. 6, art. 58 § 2.

84. *Id.* at ch.6, art. 58 § 1, art. 59.

85. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1207-12 (2008).

86. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

87. See David Stout, *Justices Overturn Death Sentence*, N.Y. TIMES, Mar. 20, 2008, <http://www.nytimes.com/2008/03/20/washington/19cnd-sctus>.

<http://www.nytimes.com/2008/03/20/washington/19cnd-sctus>.
html?ex=1363665600&en=a62a8178036ffbf&ei=5124&partner=permalink&exp=permalink, which also addresses the decision's significance.

George W. Bush authorized the first execution by the U.S. military in nearly fifty years under the Uniform Code of Military Justice; however, subsequent federal court review will resolve preserved jury composition issues arising from the Army private's 1988 convictions for two murders and attempted murder.⁸⁸

In *Medellin v. Texas*,⁸⁹ the Court held that an International Court of Justice (ICJ) ruling that a Mexican national had not been informed of his consular contact rights under the Vienna Convention on Consular Relations, supported by a U.S. President's Memorandum, did not pre-empt the State of Texas limitations on filing excessive *habeas* petitions.⁹⁰ The Court analyzed treaty law and determined that the ICJ judgment was not binding federal law under the Optional Protocol (by which by the United States agreed to submit Vienna Convention disputes to the ICJ), the U.N. Charter, or the ICJ statute, in the absence of federal and state implementation legislation. Furthermore, the U.S. Constitution does not empower the President to impose unilaterally the domestic obligations of a treaty.⁹¹ Jose Medellin was executed on August 5, 2008.⁹²

In *Kennedy v. Louisiana*,⁹³ the U.S. Supreme Court reversed (five to four) the Louisiana Supreme Court and held that the Eighth Amendment bars imposing the death penalty for raping a child. The Court reviewed prior death penalty cases, contemporary norms, and state and federal statutes and concluded that the death penalty was not a proportional punishment for child rape.⁹⁴

The Ohio Supreme Court unanimously reversed the death sentence of a convicted mentally retarded murderer who had an I.Q. of fifty-two and adaptive functioning abilities equivalent to an eleven-year-old.⁹⁵ Governor Tim Kaine of Virginia commuted the death sentence of an inmate a day before his execution on the grounds that the inmate was mentally incompetent and unable to understand his situation.⁹⁶

Due to new evidence of mistaken identity and recanted witness testimony, the U.S. Supreme Court granted a temporary reprieve to a Georgia inmate less than two hours before his execution for the 1989 killing of an off-duty police officer.⁹⁷ The Court subse-

88. See Steven Lee Myers, *Execution by Military Is Approved by President*, N.Y. TIMES, July 29, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9E07E4D8153CF93AA15754C0A96E9C8B63>.

89. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

90. For background on the Supreme Court's prior review of the issues under the Vienna Convention, the ICJ *Avena* judgment, and their interplay with federalism and state law, see *International Human Rights*, 40 INT'L LAW. 467, 468 (2006).

91. *Medellin*, 128 S. Ct. 1346. See also Robert Barnes, *Justices Rebuff Bush and World Court*, WASH. POST, Mar. 26, 2008, at A1; Linda Greenhouse, *Justices Block New Hearing for Mexican*, N.Y. TIMES, Mar. 26, 2008, at A16; David G. Savage, *Advice of Consul*, A.B.A.J., June 2008, at 24.

92. See Manuel Roig-Franzia, *Mexican National Executed in Texas*, WASH. POST, Aug. 6, 2008, at A6.

93. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008). See Linda Greenhouse, *Justices Bar Death Penalty for the Rape of a Child*, N.Y. TIMES, June 26, 2008, <http://query.nytimes.com/gst/fullpage.html?res=950DE2D81239F935A15755C0A96E9C8B63>.

94. The Supreme Court had held in *Coker v. Georgia*, 433 U.S. 584, 600 (1977), that the death penalty was barred as punishment for the rape of an adult.

95. *State v. White*, 885 N.E.2d 905, 917, (2008). See Bob Driehaus, *Death Sentence Is Overturned in Ohio*, N.Y. TIMES, Apr. 10, 2008, at A21.

96. See David Stout, *Virginia: Death Sentence Commuted*, N.Y. TIMES, June 10, 2008, at A16.

97. *Davis v. Georgia*, 129 S. Ct. 28 (2008) (granting stay of execution). See Bob Herbert, Op-Ed *What's the Rush?*, N.Y. TIMES, Sept. 20, 2008, at A19.

quently denied his petition for certiorari.⁹⁸ But the Eleventh Circuit later issued a third stay of execution in this case, which has been before twenty-nine judges in seven review proceedings.⁹⁹

In 2008, a significant statistical study of the capital justice system in Harris County, Texas—which executes more people than any state but Texas itself—concluded that not only are defendants who kill white people more likely to be sentenced to death than those who kill black people, but also that the race of the defendant by itself is a significant determinative of whether the death penalty will be imposed.¹⁰⁰

In *Baze v. Rees*,¹⁰¹ which effectuated a de facto moratorium on executions in several states in 2007 and 2008, the U.S. Supreme Court held that Kentucky's three-drug "cocktail" did not violate the Eighth Amendment to the U.S. Constitution.¹⁰² The Court ruled that challenges to prosecution protocols must prove not only that the state's execution method creates a substantial risk of severe pain, but also that feasible alternative protocols would significantly reduce that risk.¹⁰³ The case resulted in seven separate opinions, including Justice Stevens' notable concurrence in which he renounced capital punishment procedures as fundamentally unfair.¹⁰⁴

Following *Baze*, the Supreme Court declined to hear several death row challenges to lethal injection protocols, and several states proceeded with delayed executions.¹⁰⁵ In a detailed post-*Baze* summary judgment opinion, the U.S. Court of Appeals for the Fourth Circuit held that Virginia's method of lethal injection was constitutional because the inmate failed to produce evidence that would demonstrate a substantial risk of severe pain to him, and other alleged painful execution incidents lacked sufficient objective evidence.¹⁰⁶

The Supreme Court of Nebraska, in *State of Nebraska v. Mata*,¹⁰⁷ issued a seventy page opinion that concluded that the electric chair constitutes cruel and unusual punishment prohibited by the U.S. and Nebraska Constitutions. Since 2002, Nebraska had been the only state using electrocution and had executed only three prisoners since 1976.¹⁰⁸

98. *Davis v. Georgia*, 549 U.S. 829 (2008). See also William Branigin & Jerry Markon, *High Court Won't Hear Death Row Appeal*, WASH. POST, Oct. 15, 2008, at A15; Robbie Brown, *Justices Pass on Appeal; Execution is Expected*, N.Y. TIMES, Oct. 15, 2008, at A15.

99. See Robbie Brown, *Execution of Georgia Man in Killing of Officer Is Stayed a Third Time*, N.Y. TIMES, Oct. 25, 2008, at A9.

100. See Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. REV. 807, 813-14 (2008); Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES, Apr. 29, 2008, at A10. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court held (five-to-four) that statistical evidence of racial disparities in the administration of the death penalty did not violate the Constitution.

101. *Baze v. Rees*, 128 S. Ct. 1520 (2008).

102. See Nancy G. Abudu et al., *Human Rights*, 42 INT'L LAW., 756, 772 (2008).

103. See Robert Barnes, *Justices Uphold Lethal Injection Procedure*, WASH. POST, Apr. 17, 2008, at A01; Linda Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, N.Y. TIMES, Apr. 17, 2008, at A1.

104. See generally Cass R. Sunstein & Justin Wolfers, *A Death Penalty Puzzle*, WASH. POST, June 30, 2008, at A11.

105. See Darryl Fears, *After Court Ruling, States to Proceed with Executions*, WASH. POST, Apr. 23, 2008, at A2; Ralph Blumenthal, *After Hiatus, States Set Wave of Executions*, N.Y. TIMES, May 3, 2008, at A1 (review of fourteen scheduled executions); Robert Barnes, *Execution Is First Since Ruling*, WASH. POST, May 7, 2008, at A2.

106. *Emmett v. Johnson*, 532 F.3d 291, 308 (4th Cir. 2008).

107. *State of Nebraska v. Mata*, 745 N.W.2d 229, 279 (2008).

108. See Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES, Feb. 9, 2008, <http://www.nytimes.com/2008/02/09/us/09penalty.html>.

B. INTERNATIONAL DEVELOPMENTS

Over U.S. opposition, in late 2007 the U.N. General Assembly passed a nonbinding resolution for a moratorium on the death penalty.¹⁰⁹ Nevertheless, many countries continued to execute prisoners.

In its 2008 death penalty report, Amnesty International found that at least 1,252 people were executed during 2007 in twenty-four countries,¹¹⁰ and that China, Iran, Saudi Arabia, Pakistan and the United States carried out eighty-eight percent of the executions.¹¹¹ The United States was the only Western Hemisphere country that carried out executions.¹¹²

China executed more people than any other country. Amnesty International reported that 470 people were executed in 2007, 1,860 people were sentenced to death, and more than sixty offenses remained punishable by the death penalty.¹¹³ Death penalty trials in China were often held in closed courts and relied on "confessions" obtained through torture outside the presence of legal counsel.¹¹⁴

In 2008, Indonesia implemented a Constitutional Court ruling that held that the right to life did not preclude capital punishment.¹¹⁵ Subsequently, Indonesia executed by firing squad two Nigerian nationals convicted of drug smuggling. Indonesia has 112 felons on death row.¹¹⁶

Rwanda and Gabon both abolished the death penalty.¹¹⁷ In Uganda in 2008, legal proceedings challenged the death penalty as cruel, inhuman, and degrading, following a 2005 Constitutional Court ruling that vacated death sentences for 417 prisoners who had spent at least three years on death row.¹¹⁸ The Court ruled that the death sentence is not mandatory.¹¹⁹

In Mali, President Amadou Toumani Touré introduced a death penalty abolition bill that the National Assembly debated. The High Islamic Council of Mali summed up Islamic opposition: "The death penalty is defined in Islam as a legitimate act of retaliation, as enacted by God in the Koran."¹²⁰

109. See Daniel Bases, *UN Assembly Calls for Moratorium on Death Penalty*, REUTERS, Dec. 18, 2007, <http://www.alertnet.org/thenews/newsdesk/N18498859.html>.

110. AMNESTY INTERNATIONAL, *DEATH SENTENCES AND EXECUTIONS IN 2007* at 6-7 (2008), <http://www.amnesty.org/en/library/asset/ACT50/001/2008/en/b43a1e5b-ffea-11dc-b092-bdb020617d3d/act500012008eng.pdf>.

111. *Id.* at 8.

112. See *id.* at 6.

113. See AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT 2008: THE STATE OF THE WORLD'S HUMAN RIGHTS* at 93-94 (2008), <http://thereport.amnesty.org/document/101>.

114. *Id.* at 93.

115. See Peter Gelling, *Executions for Drug Crimes Are Resumed in Indonesia*, N.Y. TIMES, July 13, 2008, at A8.

116. *Id.*

117. See *UN Human Rights Chief Welcomes Abolition of Death Penalty*, U.N. NEWS SERVICE, 13 Dec. 2007, http://www.rwandagateway.org/article.php3?id_article=7606.

118. Paul Amoru & Rodney Muhumuza, *Court to Hear Death Penalty Appeal*, DAILY MONITOR, July 3, 2008, http://www.monitor.co.ug/artman/publish/news/Court_to_hear_death_penalty_appeal_67620.shtml.

119. See *Abolish death penalty—European Union*, NEW VISION, <http://www.newvision.co.ug/D/8/13/654272>.

120. See *Religious Leaders Oppose Abolition of Death Penalty*, IRIN, <http://www.irinnews.org/Report.aspx?ReportId=78693>.

In Nigeria, hundreds on death row did not have fair trials due to "corruption, negligence, and a nearly criminal lack of resources," and many confessions to capital crimes were extracted by torture.¹²¹ Nigeria's National Human Rights Commission petitioned the government to investigate the circumstances under which over fifty Nigerians are on death row in other countries.¹²²

President Ellen Johnson Sirleaf supported death penalty legislation enacted in Liberia in 2008. The U.N. Human Rights Committee asserted that the law violated the Second Optional Protocol to the International Covenant on Civil and Political Rights, signed by Liberia in 2005, which requires abolishment of the death penalty.¹²³

Iran carried out multiple public group hangings in 2008, following 298 hangings in 2007.¹²⁴ On January 1, 2008, thirteen people were hanged in an event protested by the Center for the Defense of Human Rights, a banned human rights group led by attorney Shirin Ebadi, the 2003 Nobel Peace Prize winner.¹²⁵ Iran executed twenty-nine convicts at Evin prison in Tehran in a single day for a variety of offenses punishable by death under Sharia law, enforced since the Islamic Revolution of 1979.¹²⁶ Iran held several minors on death row,¹²⁷ and extended the death penalty under Sharia law to include a sixteen year old minor convicted of having homosexual relations.¹²⁸ An Iranian judicial directive bans execution of minors for drug crimes.¹²⁹ Iran continues to execute more than two-thirds of all minors executed in the world.

Human Rights Watch conducted the first government-authorized fact-finding human rights mission in Saudi Arabia and found that children under eighteen were routinely tried as adults and faced the death penalty.¹³⁰ At least twelve children were sentenced to death in recent years, and at least three were executed in 2007. The number of people executed in 2007 quadrupled to at least 158.¹³¹ About half of all executions are of foreign citizens, mostly guest workers.

In Iraq, the legal proceedings resulting in the hanging of Saddam Hussein faced renewed international criticism in 2008 as investigative reports concluded that the rule of law was undermined by the government that forcibly removed the trial's first chief judge, by the associate judge named to succeed him, and by a third judge who was removed less

121. See *Poverty And The Death Penalty in Nigeria*, AMNESTY INTERNATIONAL, Oct. 21, 2008, <http://www.amnesty.org/en/news-and-updates/news/poverty-and-the-death-penalty-in-nigeria-20081021>.

122. See *Rights Commission Calls for Action on Death Row Nigerians*, Sept. 24, 2008, http://www.monstersandcritics.com/news/africa/news/article_1432809.php/Rights_commission_calls_for_action_on_death_row_Nigerians_; see Zuplijanin, *supra* note 47.

123. See *Liberia Death Penalty Violates International Law, Says UN Human Rights Body*, IRIN, Aug. 26, 2008, <http://www.un.org/apps/news/story.asp?NewsID=27817&Cr=death&Cr1=penalty>.

124. See Nazila Fathi, *Hanging and Amputation Find Favor in Iran Courts*, N.Y. TIMES, Jan. 11, 2008, at A3.

125. *Id.*; see also Human Rights First, *What's At Stake? Protest Threats Against Iranian Nobel Prize Winner*, <http://action.humanrightsfirst.org/campaign/Ebadi2/explanation> (last visited Mar. 2, 2009).

126. See *Iran Executes 29 Convicts in One Day*, N.Y. TIMES, July 28, 2008, at A8.

127. See *Iran: Executions of Minors Opposed*, N.Y. TIMES, June 28, 2008, at A6.

128. See Dhimmi Watch, *Iran: Death penalty for Man Accused of Homosexuality*, Sept. 24, 2008, <http://www.jihadwatch.org/dhimmiwatch/archives/022818.php> (last visited Mar. 4, 2009).

129. See *Iran bans execution for some juveniles*, PHILA. INQUIRER, Oct. 19, 2008, at http://www.philly.com/inquirer/world_us/20081019_In_the_World.html?text=xl&posted=y&viewAll=y.

130. See Human Rights Watch, *Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System*, March 2008, <http://www.hrw.org/reports/2008/saudicrd0308/>.

131. AMNESTY INTERNATIONAL REPORT 2008, *supra* note 113, at 257-58.

than a week before judgment and replaced by another judge who had heard no evidence but was deemed ready by the Iraqi government to approve the death sentence.¹³² Another investigative report found that in 2008 the Iraqi government secretly hung alleged insurgents who were not included in the official government report of thirty-three executions carried out in 2007.¹³³

In Afghanistan, after a de facto death penalty moratorium since 2004, several prisoners were executed in November 2008 and fifteen prisoners were executed in October 2007.¹³⁴ In late 2008, President Hamid Karzai approved death sentences for at least 111 additional prisoners in Afghanistan.¹³⁵

VII. Convention on the Rights of Persons With Disabilities

A. ENTRY INTO FORCE

The U.N. Convention on the Rights of Persons with Disabilities entered into force on May 3, 2008.¹³⁶ By November 2008, 136 nations had signed the Convention and forty-one nations had ratified it.¹³⁷ Seventy-nine nations signed and twenty-five ratified the optional protocol to allow the Committee on the Rights of Persons with Disabilities established by the Convention to hear individual petitions.¹³⁸ The Peoples' Republic of

132. See John F. Burns, *Western Lawyers Say Iraq Discarded Due Process in Hussein Trial*, N.Y. TIMES, Sept. 25, 2008, at A14.

133. See Robert Fisk, *Secrets of Iraq's Death Chambers*, THE INDEPENDENT (London), Oct. 7, 2008, <http://www.independent.co.uk/news/world/middle-east/secrets-of-iraqs-death-chamber-953517.html>. The hangings occurred at Saddam Hussein's former intelligence headquarters in Kazimiyah. *Id.*

134. See *Top UN Human Rights Official Urges Halt to Afghan Executions*, U.N. DAILY NEWS, Issue DH/5275 at 13, Nov. 11, 2008, <http://www.update.un.org/news/dh/pdf/english/2008/11112008.pdf>.

135. See Amnesty International, *Afghanistan Moves Towards a Wide Use of Executions*, Nov. 13, 2008, <http://www.amnesty.org/en/news-and-updates/news/afghanistan-moves-towards-wide-use-executions-20081113>.

136. See UN-Enable, *Entry into Force*, <http://www.un.org/disabilities/default.asp?id=210> (last accessed Mar. 9, 2009). The official website of the Convention is <http://www.un.org/disabilities>.

137. See UN-Enable, *Countries and Regional Integration Organizations*, <http://www.un.org/disabilities/countries.asp?id=166>. The 139 signatories (asterisk denotes ratification) include Algeria, Andorra, Antigua and Barbuda, Argentina*, Armenia, Australia*, Austria*, Azerbaijan, Bahrain, Bangladesh*, Barbados, Belgium, Benin, Bolivia, Brazil*, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chile*, China*, Colombia, Comoros, Congo (Republic of the), Costa Rica*, Cote d'Ivoire, Croatia*, Cuba*, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador*, Egypt*, El Salvador*, Estonia, Ethiopia, European Community, Finland, France, Gabon*, Germany, Ghana, Greece, Guatemala, Guinea*, Guyana, Honduras*, Hungary*, Iceland, India*, Indonesia, Ireland, Israel, Italy, Jamaica*, Japan, Jordan*, Kazakhstan, Kenya*, Laos, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali*, Malta, Mauritius, Mexico*, Republic of Moldova, Montenegro, Morocco, Mozambique, Namibia*, Nepal, Netherlands, New Zealand*, Nicaragua*, Niger*, Nigeria, Norway, Oman, Pakistan, Panama*, Paraguay*, Peru*, Philippines*, Poland, Portugal, Qatar*, Republic of Korea, Romania, Russian Federation, Rwanda*, San Marino*, Saudi Arabia*, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia*, Solomon Islands, South Africa*, Spain*, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Syria, Tanzania, Thailand*, Togo, Tonga, Trinidad and Tobago, Tunisia*, Turkey, Turkmenistan*, Uganda*, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Vietnam, Yemen, Zambia. *Id.* The updated list of signatories and ratifying state parties is available at <http://www.un.org/disabilities/countries.asp?id=166>.

138. *Id.* The 82 signatories of the Optional Protocol (asterisk denotes ratification) include Algeria, Andorra, Antigua and Barbuda, Argentina*, Armenia, Austria*, Azerbaijan*, Bangladesh*, Benin, Belgium, Bolivia, Brazil*, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chile*, Congo (Brazza-

China ratified the Convention in August 2008 shortly before the Beijing Olympics and Paralympics.¹³⁹

B. SPORTS LAW

The Disability Convention addressed the rights of persons with disabilities to participate in sports. Art. 30.5 of the Convention included the first binding international law that both promotes the integration of disability athletes into able-bodied sport and encourages the advancement of sports opportunities reserved solely for persons with disabilities.¹⁴⁰ Art. 30.5(a) encouraged the integration of disabled athletes into able-bodied sport. Art. 30.5(b) encouraged States to ensure that disabled athletes have access to disability-specific sport, including proper training and resources. Art. 30.5(e) encouraged access to services for all disability athletes involved in sport.¹⁴¹ Thus, the convention created a parallel, though unified, legal structure for the two separate sporting spheres in which disabled athletes compete.¹⁴²

On May 16, 2008, the Court of Sport Arbitration in Lausanne, Switzerland, handed down a decision in the case of *Pistorius v. International Association of Athletic Federations*.¹⁴³ The Court permitted Oscar Pistorius, a Paralympic athlete using two artificial leg prostheses, to try out for South Africa's track and field Olympic team, finding that the "advantages" the athlete enjoyed from the use of prostheses did not outweigh the disadvantages.¹⁴⁴ Pistorius argued that his exclusion from South Africa's Olympic team constituted impermissible discrimination under the Convention.¹⁴⁵ The Court found that the Convention only leveled the playing field. It did not answer the question of whether Pistorius's prostheses gave him an unfair advantage, the legal question on appeal.

ville), Costa Rica*, Cote d'Ivoire, Croatia*, Cyprus, Czech Republic, Dominican Republic, Ecuador*, El Salvador*, Finland, France, Gabon, Germany, Ghana, Guatemala, Guinea*, Honduras, Hungary*, Iceland, India, Italy, Jamaica, Jordan, Kazakhstan, Lebanon, Liberia, Lithuania, Luxembourg, Madagascar, Mali*, Malta, Mauritius, Mexico*, Montenegro, Namibia*, Nepal, New Zealand, Nicaragua, Niger*, Nigeria, Panama*, Paraguay*, Peru*, Portugal, Qatar, Romania, Rwanda*, San Marino*, Saudi Arabia*, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia*, South Africa*, Spain*, Swaziland, Sweden*, Tanzania, Togo, Tunisia*, Uganda*, Ukraine, United Arab Emirates, Yemen, Zambia. *Id.*

139. International Paralympic Committee, *China Ratified the UN Convention on the Rights of Persons with Disabilities*, (July 1, 2008), http://www.paralympic.org/release/Main_Sections_Menu/News/Current_Affairs/2008_07_01_a.html (last visited Mar. 4, 2009).

140. Convention on the Rights of Persons with Disabilities art 30.5, Dec. 13, 2006, 46 I.L.M. 443, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm#30> (last accessed Mar. 5, 2009) [hereinafter CRPD]. The CRPD also requires member states to take steps toward wheelchair accessibility for stadiums and sporting venues and to integrate sports in adolescent educational settings. *Id.* at art. 30.5(c)-(d).

141. *See id.*

142. Elise Roy, Aiming for Inclusive Sport: The Legal and Practical Implications of the United Nation's Disability Convention for Sport, Recreation, and Leisure for People with Disabilities, 5 ENT. & SPORTS L.J. 6 (2007), available at <http://go.warwick.ac.uk/eslj/issues/volume5/number1/roy/>.

143. Tribunal Arbitral du Sport [CAS] [Court of Arbitration for Sport] May 16, 2008, docket number CAS 2008/A/1480 *Pistorius v/IAAF*, available at <http://www.tas-cas.org/d2wfiles/document/1085/5048/0/amended%20final%20award.pdf>.

144. In particular, that the prostheses did not give him a height advantage, thus lengthening his stride. *See id.* at 14.

145. *Id.* at 12.

In the United States, which has not signed or ratified the Convention, three Paralympic athletes sued the U.S. Olympic Committee under the Americans with Disabilities Act (ADA) for providing different benefits packages to Olympians and Paralympians.¹⁴⁶ The Tenth Circuit ruled in favor of the U.S. Olympic Committee, holding the ADA did not require the two benefits packages to be the same.¹⁴⁷

C. INVOLUNTARY COMMITMENT AND TREATMENT

The U.N. Special Rapporteur on Torture released an Interim Report¹⁴⁸ that the involuntary treatment and confinement of persons with disabilities may constitute torture or ill-treatment in light of international legal standards and Convention provisions. Professor Nowak highlighted torture and ill-treatment in the medical context:

It is in the medical context that persons with disabilities often experience serious abuse and violations of their right to physical and mental integrity, notably in relation to experimentation or treatments directed to correct and alleviate particular impairments.¹⁴⁹

He applied the torture definition contained in Article 1 of the Convention against Torture, noting that this definition “expressly proscribes acts of physical and mental suffering committed against persons for reasons of discrimination of any kind.”¹⁵⁰ Acts of discrimination can imply intent, even where “serious violations and discrimination against persons with disabilities may be masked as ‘good intentions’ on the part of health professionals.”¹⁵¹

Noting that the administration of psychiatric drugs that dull the mind has been considered a form of torture, and that such drugs are being “administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment,” Professor Nowak stated that the suffering and adverse health effects “may constitute a form of torture or ill-treatment.”¹⁵²

Professor Nowak stated that electroconvulsive therapy (ECT) that was unmodified (without anesthesia, muscle relaxant or oxygenation) “cannot be considered as an acceptable medical practice, and may constitute torture or ill-treatment.” ECT with anesthesia, muscle relaxant and oxygenation should only be administered with the “free and informed consent of the person concerned, including on the basis of information on the secondary effects and related risks such as heart complications, confusion, loss of memory and even death.”¹⁵³

Professor Nowak called on states to adopt legislation that ensures that persons with disabilities “are provided with the support needed to make informed decisions,” in keeping

146. See Alan Schwarz, *Court Lets Ruling Stand in U.S.O.C. Case*, N.Y. TIMES, Oct. 7, 2008, at B20.

147. *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1196 (10th Cir. 2008), cert. denied, 2008 WL 2273179, 129 S. Ct. 114 (2008).

148. The Secretary-General, *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/63/175 (July 25, 2008) [hereinafter Torture Report].

149. Torture Report, *supra* note 148, ¶ 57.

150. Torture Report, *supra* note 148, ¶ 48.

151. Torture Report, *supra* note 148, ¶ 49.

152. Torture Report, *supra* note 148, ¶ 63.

153. Torture Report, *supra* note 148, ¶ 61.

with CRPD Article 12.¹⁵⁴ The Convention adopted the model of supported decision-making as an alternative to guardianship.¹⁵⁵ Supported decision-making helps a person formulate her own decisions while respecting individual autonomy.¹⁵⁶ Taking away a person's "decision-making" and "legal capacity" might render her "powerless" and, thereby, more susceptible to abuse or torture.¹⁵⁷

VIII. The International Criminal Court, the High Court of Uganda, and War Crimes

The Rome Statute of the International Criminal Court (Rome Statute), which grants the International Criminal Court (ICC) jurisdiction over crimes of genocide, war crimes, crimes against humanity, and crimes of aggression, took force in Uganda in 2002.¹⁵⁸ In 2005, the ICC issued its historic first arrest warrants at the request of Ugandan President Yoweri Museveni. The warrants targeted senior commanders of the Lord's Resistance Army (LRA), a fundamentalist Christian rebel group notorious for widespread human rights abuses in Central African Republic (CAR), southern Sudan, eastern Democratic Republic of Congo (DRC), and the Acholiland region of northern Uganda.¹⁵⁹ The suspects, LRA general Joseph Kony and deputy general Dominic Ongwen, face multiple counts of war crimes and crimes against humanity.¹⁶⁰ The LRA has repeatedly asked for the withdrawal of the ICC warrants as a precondition to final disarmament and demobilization.¹⁶¹

Despite the outstanding ICC warrants requested by Uganda, on February 19, 2008, Uganda and the LRA adopted an annex (Annexure) to an earlier Agreement on Accountability and Reconciliation signed June 29, 2007. The Annexure provided for the establishment of a "special division of the High Court of Uganda . . . to try individuals who are alleged to have committed serious crimes during the [LRA] conflict."¹⁶² Amnesty International condemned the Annexure for appeasing the rebels by "seek[ing] to avoid Uganda's legal obligation to arrest and surrender the LRA leaders to the International

154. Torture Report, *supra* note 148, ¶ 73; CRPD, *supra* note 140, art. 12.

155. CRPD, *supra* note 140, art. 12.

156. International Disability Alliance CRPD Forum, Principles for Implementation of Article 12, <http://www.moodle.disabilityknowledge.org/file.php/16/12/CAUCUSFinal.pdf>.

157. Torture Report, *supra* note 148, ¶ 50.

158. Rome Statute of the International Criminal Court art. 5, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter *Rome Statute*].

159. See Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004), http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20_lra_%20to%20the%20icc.

160. See Press Release, Int'l Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders, ICC-20051014-110 (Oct. 14, 2005), <http://www2.icc-cpi.int/NR/exeres/4BCE015E-9F70-4CD1-8AC2-4CACDB6070B6.htm>; Int'l Criminal Court, Fourteenth Diplomatic Briefing of the International Criminal Court (Oct. 8, 2008), www.icc-cpi.int/NR/rdonlyres/90ED4A0B-029E-49BA-8AA2-9DA59BE3EB09/278643/ICCDB14IPENG.pdf.

161. See, e.g., *Ugandan Rebels in Amnesty Demand*, BBC NEWS, Sept. 6, 2008, <http://news.bbc.co.uk/2/hi/africa/5320254.stm>.

162. Annexure to the Agreement on Accountability and Reconciliation, Uganda-LRA, ¶ 5, Feb. 19, 2008, www.iccnw.org/documents/ANNEXURE_to_AGREEMENT_ON_ACCOUNTABILITY_signed_today.pdf.

Criminal Court.”¹⁶³ Article 59 of the Rome Statute requires Uganda to “immediately take steps to arrest” the LRA leadership and deliver them to the ICC “as soon as possible.”¹⁶⁴

The ICC launched an inquiry into the Annexure’s “implications and consequences for execution of the outstanding warrants of arrest.”¹⁶⁵ Mr. Museveni responded that domestic prosecution of the LRA leadership would render the ICC warrants “redundant and impotent.”¹⁶⁶ However, ICC officials maintained that the warrants would be executed irrespective of any High Court proceedings.¹⁶⁷ The ICC launched a community outreach and education program in Acholiland to garner support among victims of the LRA insurgency.¹⁶⁸

Peace talks collapsed in April 2008 after Mr. Kony refused to sign a final peace agreement, citing concerns over the lack of clear charges or sentencing guidelines under the proposed system. The LRA fled to the Garamba forest region of northeastern DRC, from where it resumed attacks on civilian populations in the DRC, CAR, and Sudan.¹⁶⁹

In May 2008, the Principal Judge of the High Court, James Ogoola, appointed Justice Dan Akiiki-Kiiza to head the war crimes division, with the assistance of Justice Eldad Mwangusya and Lady Justice Ibanda Nahamya, who served at the Special Court for Sierra Leone.¹⁷⁰ But the Ugandan legislature has yet to procure an operating budget or facilities for the war crimes court, which relies entirely on donor funds. Ugandan officials have privately conceded that the court is unprepared to hold trials.¹⁷¹ “With all due respect, the judiciary rushed to set up this court,” remarked Caleb Alaka, a former legal adviser to the LRA delegation at Juba, in September 2008. “They can’t even define a war crime or how the hearing will be conducted.”¹⁷²

Human Rights Watch questioned the High Court’s inconsistent adherence to international fair trial standards and possible imposition of the death penalty under the Ugandan

163. Amnesty International, *Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to end Impunity*, Mar. 1, 2008, AMNESTY INT’L, AFR 59/001/2008, available at <http://www.unhcr.org/refworld/pdfid/4847a4872.pdf>.

164. Rome Statute, *supra* note 158, at art. 59.

165. INT’L CRIMINAL COURT, *Twelfth Diplomatic Briefing of the International Criminal Court 8*, Mar. 18, 2008, <http://www2.icc-cpi.int/NR/rdonlyres/73723A41-7E51-4671-A95B-2B46EA88B26F/278588/ICCDB12IPENG.pdf>.

166. Yasiin Mugerwa, Museveni, ICC ‘Heading for Confrontation’, THE MONITOR, Mar. 15, 2008, available at <http://allafrica.com/stories/printable/200803170133.html>. See also Rome Statute, *supra* note 158, at preamble (emphasizing role of ICC as “complementary to national criminal jurisdictions”). But see *id.* at art. 61 (prescribing that only ICC Prosecutor may withdraw charges, and only upon permission of Pre-Trial Chamber).

167. See, e.g., Simon Kasyate, *Uganda: LRA Leader Joseph Kony Will Be Arrested, Says ICC*, THE MONITOR, May 30, 2008, available at <http://allafrica.com/stories/200805300004.html>.

168. Press Release, Int’l Criminal Court, ICC Launches Schools Outreach Programme in North-eastern Uganda, ICC-CPI-20080314-PR299 (Mar. 14, 2008), available at <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Uganda/Press+Releases/>, (follow “ICC launches schools outreach programme in north-eastern Uganda” posted on “14.03.2008”).

169. See Fourteenth Diplomatic Briefing of the International Criminal Court, *supra* note 160, at 9.

170. Hillary Nsambu, *Uganda: Ogoola Names Judges On Anti-Corruption, War Crimes Court*, NEW VISION, May 25, 2008, available at <http://allafrica.com/stories/200805261067.html>.

171. Rosebell Kagu, *Kampala War Crimes Court Under Scrutiny*, INSTITUTE FOR WAR & PEACE REPORTING, Sept. 29, 2008 (quoting statement by High Court official that war crimes division is “not ready to try anybody . . . [and] do[es]n’t know even whether investigations into the crimes . . . have started”), available at http://www.iwpr.net/?p=acr&s=f&o=346910&apc_state=henh.

172. *Id.*

penal code,¹⁷³ and called for the proposed court to try Ugandan military personnel accused of human rights abuses during the counterinsurgency campaign.¹⁷⁴

IX. Pinochet-Era Human Rights Abuses

In 2008, Chilean courts denied remedies to victims of human rights abuses committed during the Pinochet regime (1973-1989). The Pinochet regime enacted Decree Law (DL) 2191¹⁷⁵ in 1978, declaring amnesty for itself for crimes committed between September 11, 1973 and March 10, 1978, based on the regime's ability to bring "peace and order" to the country. The courts initially held that DL 2191 was constitutional and did not infringe upon an individual's equality before the law, right to life, or personal liberty.¹⁷⁶ DL 2191 thereby precluded prosecution of persons responsible for torture, disappearances, and extrajudicial killings occurring during Pinochet's regime.

The Supreme Court held in 2004 that DL 2191 is contrary to international law norms that prohibit amnesty in cases involving crimes against humanity.¹⁷⁷ Human rights advocates also argued successfully against application of DL 2191 by classifying enforced disappearances as a crime outside the temporal scope of the amnesty law because the crime continues until the disappeared person's remains are discovered.¹⁷⁸ In 2006, the Inter-American Court of Human Rights condemned DL 2191 and called on Chile to adopt measures so that DL 2191 was not an obstacle to the investigation or punishment of those responsible for human rights abuses that occurred during the dictatorship.¹⁷⁹

In 2008, Chilean courts denied remedies to victims of human rights abuses and their family members through application of *prescripción* and *media prescripción*. *Prescripción* is akin to a judicially imposed statute of limitations and precludes prosecution where an action is brought after a certain date.¹⁸⁰ *Media prescripción*¹⁸¹ is a modified form of *prescripción* that courts use to reduce sentences imposed on convicts based on passage of time. The courts failed to acknowledge that any delay in seeking prosecution is often based on a perpetrator's previously protected status under DL 2191 or an individual's inability to obtain information concerning a crime. The Supreme Court applied *media prescripción* in

173. See *Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation*, HUMAN RIGHTS WATCH, 7-8 (Feb. 2008), available at <http://hrw.org/backgrounder/ij/uganda0208/ugandamemo0208web.pdf>.

174. High Court Justice Dan Akiiki-Kiiza later rejected calls to try Ugandan military personnel, holding in September 2008 that the subject matter jurisdiction of the war crimes division could not extend beyond the terms of the Annexure. See Paul Amoru, *Uganda: Local War Crimes Court Excludes UPDF From Trial*, THE MONITOR, Sept. 18, 2008, available at <http://allafrica.com/stories/200809180042.html>.

175. Decree Law 2191 (Apr. 18, 1978), DIARIO OFICIAL No. 30,042 (Apr. 19, 1978), available at http://www.archivochile.com/Poder_Dominante/pod_publico/PDparlamento0005.pdf.

176. See Francisco Zúñiga U., *Sentencia en el "caso Molco" de la Excm. Corte Suprema de 13 de diciembre de 2006*, 5 No. 1 ESTUDIOS CONSTITUCIONALES, Dec. 13, 2006, at 526, available at http://www.cecocoh.cl/html/revista/docs/estudiosconst/revistano_5_1.htm/Comentario%20a%20la%20sent_5_%201-2007.pdf.

177. Miguel Ángel Sandoval, Corte Suprema, Rol No. 517-2004, Folio 22267 (Nov. 17, 2004).

178. Zúñiga U., *supra* note 176, at 528.

179. Luis Alfredo Almonacid Arellano et al. v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp.pdf. See also INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2008 476 (Nicolás Espejo Y. ed., Universidad Diego Portales 2008).

180. See *Episodio Vidal Riquelme*, Supreme Court, Rol No. 6626-2005, Folio 29335 (Nov. 12, 2007).

181. *Media prescripción* finds legal support in Article 103 of Chile's Penal Code (last modified May 31, 2002), available at <http://www.servicioweb.cl/juridico/Codigo%20Penal%20de%20Chile%20libro1.htm>.

the cases of *Episodio Liquiñe*¹⁸² and *Jorquera Gutiérrez*,¹⁸³. On September 25, 2008, the Court decided *Episodio Liquiñe*, in which the defendants had been involved in kidnapping eleven farm workers from the region of Liquiñe in October 1973. The Court reduced army general Hugo Alberto Guerra Jorquera's sentence from eighteen years to five years and businessman Luis Osvaldo García Guzmán's sentence from five years to three years, applying *media prescripción* based on the "large amount of time that had passed since the commission of these punishable acts." Both received supervised release. On September 16, 2008, the Supreme Court decided *Jorquera Gutiérrez*, which involved the kidnapping of an army official on January 23, 1978. The majority in *Guillermo Jorquera* reduced army general Héctor Manuel Orozco Sepúlveda's sentence of eight years to six years and acquitted army officer Adolfo Fernando Born Pineda, applying *media prescripción* based on the desire to impose a "humanized punishment" after the passage of so many years. The Supreme Court may further reduce sentences imposed on human rights abusers if recent lower court decisions are appeal to the Supreme Court. On September 30, 2008, Judge Juan Eduardo Fuentes Belmar issued a decision in *Alvaro Barrios Duque*,¹⁸⁴ sentencing members of the Dirección de Inteligencia Nacional (DINA), Chile's secret police, to prison terms for Mr. Barrios's kidnapping on August 14, 1974. Judge Fuentes sentenced former head of DINA Manuel Contreras Sepúlveda to five years, army general Miguel Krassnoff Martchenko to three years, and army colonel Marcelo Moren Brito to three years.

On August 4, 2008, Judge Alejandro Solís Muñoz of the court of appeals in Santiago issued a decision in *Tejas Verdes*¹⁸⁵ and condemned six Army and Investigations Police officials for the kidnapping and disappearance of Miguel Heredia Vázquez in December 1973. Judge Solís sentenced Mr. Contreras to fifteen years as the instigator of Mr. Heredia's kidnapping and disappearance and sentenced military doctor Vittorio Orvieto Tiplitzky to five years. Mr. Orvieto oversaw treatment of prisoners and authorized officials' use of torture.

In another important case, the court of appeals in Santiago held on June 10, 2008, that the disposal of remains of disappeared individuals by throwing the remains in the ocean constituted a crime against humanity and not a mere violation of the Sanitary Code, as held by the court of first instance.¹⁸⁶ The court of appeals in Santiago increased the sentence for the nine convicted army officials to 200 days in prison.

182. *Episodio Liquiñe*, Corte Suprema, Rol No. 4662-2007, Folio 26713 (Sept. 25, 2008).

183. *Guillermo Jorquera Gutiérrez*, Corte Suprema, Rol No. 5789-2007, Folio 26072 (Sept. 16, 2008).

184. *See Ministros Juan Eduardo Fuentes Dicta Condena en Caso de Secuestro de Álvaro Barrios Duque*, FASIC, Oct. 1, 2008, <http://www.fasic.org/doc/NOTAcasoBARRIOSDUQUE.html>, decision available at <http://www.fasic.org/doc/fallos%20judiciales/08/FALLODUQUE.pdf>.

185. *See Juez Solís Condena a Seis Oficiales (R) por Tejas Verdes*, FASIC, Aug. 4, 2008, <http://www.fasic.org/doc/NOTAverdeHEREDIA.html>, available at <http://www.fasic.org/doc/falloHerediaSC.pdf>.

186. *Maria Barros Perelmann v. Hernan y otros*, Corte de Apelaciones de Santiago, Rol No. 2231-2007, Folio 69974 (June 10, 2008). *See Fallo Clave Condena a Autores de Desentierrros*, FASIC, June 12, 2008, <http://www.fasic.org/doc/NOTAexhumMONEDA.html>.

X. Kosovo

On February 17, 2008, Kosovo formally declared independence and sovereignty from the Republic of Serbia.¹⁸⁷ The Assembly of Kosovo declared Kosovo a “democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law”¹⁸⁸ and pledged to adopt a democratic constitution enshrining Kosovo’s commitment to respect the human rights and fundamental freedoms of all citizens.¹⁸⁹

Kosovo’s declaration of independence evoked mixed reactions from the international community. While several major states were quick to recognize Kosovo as an independent republic, including the United States, Great Britain, France, and Germany,¹⁹⁰ a majority of U.N. member states declined to do so, including European Union Member States Spain, Slovakia, Greece, Cyprus, Romania,¹⁹¹ China, and India. As expected, the strongest opposition to Kosovo’s independence came from Serbia and Russia, who immediately denounced the declaration as illegal under international law. Serbian President Boris Tadic stated that Kosovo’s unilateral declaration of independence violated Serbia’s territorial integrity and sovereignty and contravened U.N. Security Council Resolution 1244 (1999).¹⁹² Russia, echoing concerns of other states with their own internal separatist conflicts, maintained that the unilateral declaration would set a dangerous precedent for other regional conflicts.¹⁹³ Nevertheless, the Kosovo Assembly passed a new constitution on April 9, 2008¹⁹⁴ that went into force on June 15, 2008, even while Serbia and Russia continued to reject Kosovo’s independence as illegal and refused its constitution as void.¹⁹⁵

Upon a motion presented by Serbia, the U.N. General Assembly on October 8, 2008 passed a resolution requesting a non-binding advisory opinion from the International Court of Justice (ICJ) on the question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”¹⁹⁶ On October 17, 2008, the ICJ delivered an order giving member states

187. See KOSOVO DECLARATION OF INDEPENDENCE (Kosovo, 2008), available at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en>.

188. *Id.* ¶ 2 (Kosovo, 2008).

189. See *id.* ¶ 4 (Kosovo, 2008).

190. See *US, Major EU States Recognize Independent Kosovo*, JURIST LEGAL NEWS & RESEARCH, Feb. 18, 2008, available at <http://jurist.law.pitt.edu/paperchase/2008/02/us-major-eu-states-recognize.php>.

191. See *id.*

192. Address of President Boris Tadic to the UN Secretary-General of the United Nations (Feb. 17, 2008), available at <http://www.predsednik.yu/mwc/default.asp?c=301500&g=20080217164732&lng=eng&hs1=0>.

193. See *Russian Foreign Minister Says International Law Backs Opposition to Kosovo Secession*, JURIST LEGAL NEWS & RESEARCH, (Feb. 25, 2008), available at <http://jurist.law.pitt.edu/paperchase/2008/02/russia-for-foreign-minister-says.php>.

194. See *Kosovo Parliament Adopts New Constitution*, JURIST LEGAL NEWS & RESEARCH, (Apr. 9, 2008), available at <http://jurist.law.pitt.edu/paperchase/2008/04/kosovo-parliament-adopts-new.php>.

195. See *Kosovo Constitution Goes into Force Despite Serbia Protest*, JURIST LEGAL NEWS & RESEARCH, (Jun. 16, 2008), available at <http://jurist.law.pitt.edu/paperchase/2008/06/kosovo-constitution-goes-into-force.php>; *Russia refuses to recognize new Kosovo constitution* (Jun. 17, 2008), JURIST LEGAL NEWS & RESEARCH, available at <http://jurist.law.pitt.edu/paperchase/2008/06/russia-refuses-to-recognize-new-kosovo.php>.

196. G.A. Res. 63/3, U.N. GAOR, 63rd Sess., U.N. Doc. A/Res/63/3, (Oct. 8, 2008); Order—Fixing of time-limits: Written Statements and Written Comments, Accordance with International Law of the Unilateral Declaration of Independence of the Provisional Institutions of Self-Government of Kosovo (Request for

until April 17, 2009 to submit written statements on the question before the ICJ, and a further deadline of July 17, 2009 for member states to submit written comments to those statements submitted by other states.¹⁹⁷ In its order, the Court invited Kosovo authorities to make written submissions.¹⁹⁸ U.S. Secretary of State Condoleezza Rice's remarks on February 18, 2008, recognizing Kosovo's independence, may echo arguments on behalf of Kosovo's recognition:

The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today.¹⁹⁹

XI. U.S. Child Soldier Accountability Act

In October 2008, George W. Bush signed the Child Soldiers Accountability Act,²⁰⁰ making it a federal crime to "knowingly recruit[], enlist[], or conscript[] a person to serve while such person is under fifteen years of age."²⁰¹ "The Act establishes federal jurisdiction for prosecution of offenders with a connection in the U.S., whether they are U.S. nationals, permanent residents, currently present in the U.S. or for whom the offense occurred in whole or in part in the U.S."²⁰² Penalties include imprisonment up to twenty years, or if recruitment resulted in a child's death, "for any term of years or life" in prison.²⁰³ It also allows the U.S. to deport²⁰⁴ or deny entry²⁰⁵ to individuals who knowingly recruited child soldiers. The statute of limitations is ten years from the date of the offense.

The recruitment and use of children as soldiers in armed conflicts was recognized in 1998 as a war crime falling under the jurisdiction of the International Criminal Court.²⁰⁶ For the first time, in 2007, the Special Court for Sierra Leone convicted four former military commanders for recruiting and using children as soldiers.²⁰⁷ Between 2004 and

Advisory Opinion), 2008 I.C.J., General List No. 141 (Oct. 17, 2008), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=141> [hereinafter Order-Fixing of time-limits].

197. *Id.* ¶ 2-3.

198. *Id.* ¶ 4.

199. Remarks by U.S. Secretary of State Condoleezza Rice, U.S. Department of State, U.S. Recognizes Kosovo as Independent State (Feb. 18, 2008), *available at* http://poland.usembassy.gov/poland/official_texts_and_speeches/official-text-and-speeches-2008/u.s.-recognizes-kosovo-as-independent-state-20-february-2008.

200. Child Soldier Accountability Act, 18 U.S.C. § 2442; Immigration and Nationality Act, 8 U.S.C. § 1227(a)(4)(F); Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(G); *see generally* S. 2135, 110th Cong., 2d Sess. (2008) (enacted).

201. Child Soldier Accountability Act, 18 U.S.C. §§ 2442(a).

202. Child Soldier Accountability Act, 18 U.S.C. §§ 2442(c).

203. Child Soldier Accountability Act, 18 U.S.C. § 2442(a).

204. Immigration and Nationality Act, 8 U.S.C. § 1227(a)(4)(F).

205. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(G).

206. Human Rights Watch, *Sierra Leone: Landmark Convictions for Use of Child Soldiers*, June 19, 2007, [avahttp://hrw.org/english/docs/2007/06/20/sierra16214.htm](http://hrw.org/english/docs/2007/06/20/sierra16214.htm) (last visited Nov. 2, 2008) [hereinafter *Sierra Leone*].

207. *Id.*

2007, children have been engaged in armed conflicts between in at least seventeen countries.²⁰⁸

XII. Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACHR) decides important cases on freedom of expression and due process.

In *Kimel v. Argentina*,²⁰⁹ a well-known Argentinean political writer was charged with libel after publishing *The Massacre of San Patricio*, a book that criticized a judge for mishandling the San Patricio investigation.²¹⁰ After being convicted under a repealed section of the criminal code and sentenced to one-year of imprisonment and a large fine, Eduardo Kimel alleged that Argentina violated his right to a fair trial and freedom of thought and expression.²¹¹ The Court found that the State breached its responsibility to protect and ensure plaintiff's rights under the American Convention.²¹² The Court ordered the State to terminate Kimel's prison sentence, remove his name from public records, pay damages, acknowledge responsibility through a public act, amend domestic legislation to conform to the American Convention, and comply with legal certainty requirements to prevent future legal conflict.²¹³

In *Neptune v. Haiti*, the first case involving Haiti presented to the IACHR, the Court found in favor of former Prime Minister Yvon Neptune.²¹⁴ After receiving notice that an arrest warrant accused him of involvement in the Saint Marc massacre, Neptune was arrested without being informed of the reasons for his detention, his right²¹⁵ of access to prompt judicial proceedings, appropriate separation from convicted criminals while detained, or protections for his mental, physical, or moral integrity.²¹⁶ The IACHR criticized the treatment of Neptune and determined that the State had violated eleven provisions of the American Convention including: Article 1.1 (State's duty to ensure human rights); Articles 5.1, 5.2, and 5.4 (right to human treatment); Articles 7.1, 7.2, 7.3, 7.4, and 7.5 (right to personal liberty); and Articles 8.1 and 25 (right to a fair trial and to judicial protection).²¹⁷ The Court assessed \$95,000 in damages and reparations and ordered Haiti to adopt and publish judicial and legislative measures to ensure due process and the protection of rights for the accused.²¹⁸

208. Press Release, Human Rights Watch, *United States: Bush Signs Law on Child Soldiers* Oct. 8, 2008, <http://www.hrw.org/en/news/2008/10/08/united-states-bush-signs-law-child-soldiers> (last viewed on Nov. 23, 2008).

209. *Kimel v. Argentina* Case, 2008 Inter-Am. Ct. H.R., (ser. C) No. 177, at ¶ 1 (May 2, 2008). available at <http://www.corteidh.or.cr/casos.cfm?&CFID=449480&CFTOKEN=52420716>.

210. *Id.* ¶ 2.

211. *Id.* ¶¶ 2-3.

212. *Id.* ¶ 140.

213. *Id.*

214. *Yvon Neptune v. Haiti* Case, 2008 Inter-Am. Ct. H.R. (ser. C) No. 180, at ¶¶ 1, 192 (May 6, 2008), available at <http://www.corteidh.or.cr/ca>

215. *Id.* ¶ 9.

216. *Id.*

217. Brian Concannon Jr., *Background Paper Inter-American Court of Human Rights Decision Regarding Former Prime Minister Yvon Neptune's "Judicial Insecurity" in Haiti*, (July 9, 2008), <http://www.ijdh.org/pdf/headline7-09-08.pdf>.

218. *Yvon Neptune v. Haiti* 2008 Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 192.

This judgment was applauded as a first step toward undoing damage caused by the Interim Government's disregard of due process, and the public hoped that the decision would cause the release of hundreds of political detainees following Haiti's 2004 coup d'état.²¹⁹ The opinion brought attention to fundamental problems facing Haiti regarding prison conditions and due process.²²⁰ The Court gave Haiti two years to bring its prison conditions up to at least minimal standards.²²¹

The case of *Casteñada Gutman v. Mexico* was brought to the IACHR in 2006 when Casteñada Gutman contended that the State violated Article 25 of the American Convention by not providing the means necessary to register as an independent candidate for the Mexican presidency.²²² The Inter-American Commission of Human Rights brought this case before the Court to address the nonexistence of a simple and effective internal remedy.²²³ The Court found that Mexico violated Article 25 by not providing sufficient judicial protection of the right to register as an independent candidate, but found that Mexico did not violate the right to recognition or equality before the law.²²⁴ The Court ordered Mexico to amend its legislation to comply with Article 25 and pay damages to Mr. Casteñada.

XIII. U.N. Human Rights Council

In 2008, the U.N. Human Rights Council focused on institution-building. The Council completed three regular sessions, three special sessions, and a commemoration of the sixtieth anniversary of the Universal Declaration of Human Rights. Three out of four of the Council subsidiary bodies held sessions.²²⁵ For the first time, the Universal Periodic Review (UPR) mechanism became operational.

In its March 2008 regular session, the Council held its yearly high-level segment,²²⁶ continued the review, rationalization, and improvement of mandates,²²⁷ appointed the first members of the Human Rights Council Advisory Committee,²²⁸ and applied the new procedure for nominating and appointing experts as special procedure mandate holders.²²⁹ The implementation of these processes continued at the June 2008 regular session when

219. See Brian Concannon, Jr., *Inter-American Court Finds Haiti Is Violating Human Rights of Former PM Neptune*, (July 9, 2008), <http://www.indybay.org/newsitems/2008/07/09/18514951.php>.

220. Brian Concannon, Jr., *National Lawyer's Guild Applauds Inter-American Court Decision in Yvon Neptune v. Haiti*, (July 14, 2008), <http://www.indybay.org/newsitems/2008/07/14/18516071.php>.

221. *Id.*

222. *Castañeda-Gutman v. Mexico* Case, 2008 Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 2-3 (Aug. 6, 2008), available at <http://www.corteidh.or.cr/>.

223. Press Release, IACHR Concludes its 128th Period of Sessions, Inter-Am. C.H.R. No. 40/07 (Aug. 1, 2007), available at <http://www.cidh.org/Comunicados/English/2007/40.07eng.htm>.

224. *Id.* ¶ 251.

225. The Human Rights Council Advisory Committee held its first session from August 4 to 15, 2008. The Social Forum held its first session as a reinvigorated body with an enhanced mandate, from September 1-3, 2008. The Expert Mechanism on the Rights of Indigenous Peoples held its first session from October 1-3, 2008.

226. See Institution-building of the United Nations Human Rights Council, H.R.C. Res. 5/1, ¶ 116., U.N. Doc. A/C.3/62/L.32 (June 18, 2007), [hereinafter Institution-building]

227. *Id.* ¶¶ 54-64.

228. *Id.* ¶¶ 65-74.

229. *Id.* ¶¶ 39-53.

the Council appointed a chair for the new Forum on Minorities²³⁰ along with five members of the new expert mechanism on the rights of indigenous peoples.²³¹ In its regular session of September 2008, the Council commended the recent appointment of Ms. Navi Pillay as U.N. High Commissioner for Human Rights;²³² heard oral reports of the 2008 Social Forum²³³ and the first session of the Advisory Committee;²³⁴ and considered the report of the high-level fact-finding mission to Beit Hanoun which was conducted from May 26-28, 2008.²³⁵ At its three regular sessions, the Council hosted a number of panels²³⁶ and special events,²³⁷ considered periodic reports, held interactive dialogues with special procedures mandate holders, and held general debates on several agenda items.²³⁸

230. See Forum on Minority Issues, H.R.C. Res. 6/15, ¶ 4, U.N. Doc. A/HRC/RES/6/15 (Sept. 28, 2007), (requesting the President of the U.N. Human Rights Council to appoint for each session, on the basis of regional rotation, and in consultation with regional groups, a chairperson of the Forum among experts on minority issues, nominated by members and observers of the Council; the chair will serve in his/her personal capacity and be responsible for the preparation of a summary of the discussion of the Forum).

231. See Expert Mechanism on the Rights of Indigenous Peoples, H.R.C. Res. 6/36, ¶ 3, U.N. Doc. A/HRC/RES/6/36 (Dec. 14, 2007) (deciding that the expert mechanism shall consist of five independent experts, the selection of which shall be carried out in accordance with the procedure established in ¶¶ 39-53 of the Annex to H.R.C. Res. 5/1).

232. Navanethem Pillay, U.N. Comm'r for Human Rights, Address to the First United Nations Forum on Minority Issues Minorities and the Right to Education, (Oct. 8, 2008), *available at* <http://www.2ohchr.org/English/bodies/hrcouncil/minority/docs/statements/final-draft-HC-statement.doc>.

233. The U.N. Human Rights Council will consider the written report of the 2008 Social Forum at its tenth session in March 2009.

234. The U.N. Human Rights Council will consider the written report of the first session of the Human Rights Advisory Committee at its tenth session in March 2009.

235. See U.N. Hum. Rts. Council (HRC), *Report of the High-Level Fact-Finding Mission to Beit Hanoun Established Under Council Resolution*, U.N. Doc. A/HRC/RES/9/26 (Sept. 1, 2008).

236. The methods of work of the Council Resolution 5/1 may include panel debates, seminars and round tables as tools for enhancing dialogue and mutual understanding on certain issues. See Institution-building, *supra* note 226, ¶ 115. At its seventh regular session, the Council hosted a panel on Human Rights Voluntary Goals as mandated by the Council Resolution 6/26. (See Elaboration of Human Rights Voluntary Goals to be Launched on the Occasion of the Celebration of the Sixtieth Anniversary of the Universal Declaration of Human Rights, H.R.C. Res. 6/26, ¶ 2, U.N. Doc. A/HRC/RES/6/26 (Dec. 14, 2007)). At its seventh regular session the Council also hosted a panel on Intercultural dialogue on Human Rights aimed at understanding better the ways in which the universal character of human rights is perceived in various cultural environments. At its eighth regular session, the Council hosted a discussion on human rights of women as a follow-up to G.A. Res. 61/143 which calls on the Council to discuss violence against women as it relates to its mandate, with a view to setting priorities in addressing this issue. At its ninth regular session, the Council hosted an annual discussion on the integration of a gender perspective (see Integrating the Human Rights of Women Throughout the United Nations System, H.R.C. Resolution 6/30, ¶ 22, U.N. Doc. A/HRC/RES/6/30 (Dec. 14, 2007)), and a Panel on Missing Persons, see Missing Persons, H.R.C. Res. 7/28, ¶ 11, U.N. Doc. A/HRC/RES/7/28 (Mar. 28, 2008), ¶ 11).

237. For example, at its eighth regular session, the Council held a special event dedicated to the entry into force of the Convention on the rights of persons with disabilities and a special event on the draft U.N. guidelines for the appropriate use and conditions of alternative care for children in view to enhance the implementation of the Convention on the Rights of the Child.

238. The U.N. Human Rights Council agenda includes ten items, which has been set up in the U.N. Human Rights Council Resolution 5/1. See: Institution-building, *supra* note 226, ¶ 109.

A. SPECIAL SESSIONS

In 2008, the Council held the sixth, seventh, and eighth special sessions. While the seventh special session was devoted to the theme of hunger, the other two special sessions focused on situations in particular countries. At its sixth special session, on January 23, 2008, the Council considered human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly in the Gaza Strip.²³⁹

At the seventh special session, on May 22, 2008, the Council considered how the worsening world food crises negatively affected the right to food for all. U.N. Human Rights Council Resolution S-7/1 expressed grave concern that the crisis threatened achievement of Millennium Development Goals, in particular, Goal One aimed at halving by 2015 the proportion of people who suffer from hunger. The Resolution called upon states, relevant multilateral institutions, and other relevant stakeholders, to ensure realization of the right to food as an essential human rights objective. It stressed that states have a primary obligation to meet the vital food needs of their own populations, especially vulnerable groups and households, while the international community should support national and regional efforts by assisting increased food production through transfer of technology and food crop rehabilitation assistance and food aid.²⁴⁰

At its eighth special session, on November 28, 2008, the Council considered the situation of human rights in the Democratic Republic of Congo.²⁴¹

B. UNIVERSAL PERIODIC REVIEW (UPR)

The UPR mechanism, created by the Council in the Annex to its Resolution 5/1, was established and functional for its first year of operation. Through the UPR, the human rights situations in all U.N. member states are expected to be reviewed by 2011. In 2008, the UPR Working Group held its first²⁴² and second²⁴³ sessions at which it reviewed and

239. The major outcome of the sixth special session was the Council Resolution S-6/1 at which the Council called for immediate protection of Palestinian civilians in the Occupied Palestinian Territory in compliance with human rights law and international law and urged all parties to refrain from violence against the civilian population. See G.A., *Report of the Human Rights Council on Its Sixth Special Session*, U.N. Doc.A/HRC/S-6/2 (Mar. 31, 2008).

240. See G.A., *Report of the Human Rights Council on its Seventh Special Session*, ¶ 4, U.N. Doc. A/HRC/S-7/2 (July 17, 2008).

241. The major outcome of the eighth special session was the Council Resolution S-8/1 at which the Council expressed of concern at the deteriorating human rights and humanitarian situation in North Kivu and called for the immediate end to all human rights violations and the unconditional respect for the rights of civilians. See G.A., *Report of the Human Rights Council on its Eighth Special Session*, U.N. Doc.A/HRC/S-8/2 (Jan. 16, 2009).

242. During its first session held from April 7-18, 2008, the UPR Working Group reviewed and adopted reports of the following countries: Algeria, Argentina, Bahrain, Brazil, Czech Republic, Ecuador, Finland, India, Indonesia, Morocco, the Netherlands, the Philippines, Poland, South Africa, Tunisia, and the United Kingdom.

243. During its second session held from May 5-19, 2008, the UPR Working Group reviewed and adopted reports of the following countries: Benin, France, Gabon, Ghana, Guatemala, Japan, Mali, Pakistan, Peru, Republic of Korea, Romania, Sri Lanka, Switzerland, Tonga, Ukraine, and Zambia.

adopted outcome reports for thirty-two countries.²⁴⁴ The outcome reports provide commentary, questions, and criticism from different countries regarding the country under review. For example, in the Netherlands outcome report, Iran expressed concern about a Dutch film that criticized the Koran as “an example of incitement to religious and racial hatred” and the subject of questioning by Cuba, referring to the same film, underscored that “an anti-Islamic approach . . . is an offence to people who hold that faith” and constitutes “exaggerated use of freedom of speech.”²⁴⁵ The outcomes of the first two sessions of the UPR Working Group were adopted by the Council at its eighth session.²⁴⁶

XIV. European Court of Human Rights

In 2008, the European Court of Human Rights (ECHR) heard *Fägerskiöld v. Sweden*, its first case concerning nuisance caused by a wind turbine.²⁴⁷ Swedish national applicants complained that three wind turbines near their vacation home exceeded the recommended maximum noise level at a residential property,²⁴⁸ and interfered with their right to peacefully enjoy their property under Article 8 of the European Convention on Human Rights (Convention).²⁴⁹ To establish an Article 8 complaint the consequences of the nuisance must be sufficiently severe environmental pollution that affect individuals’ well being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life.²⁵⁰ The court held that although the applicants were affected by the wind turbines, the nuisance did not constitute severe environmental pollution, and there was not enough evidence to establish that they had been physically affected by the nuisance.²⁵¹

XV. Water in Africa

In 2008, a South African court upheld the human right to free, safe drinking water under international conventions and the 1996 South African Constitution. Article 27 of the Constitution deals with healthcare, food, social security, and water:

- (1) Everyone has the right to have access to
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and

244. During its third session held from December 1-15, 2008, the UPR Working Group reviewed and adopted reports of the following countries: the Bahamas, Barbados, Botswana, Burkina Faso, Burundi, Cape Verde, Colombia, Israel, Liechtenstein, Luxembourg, Montenegro, Serbia, Turkmenistan, Tuvalu, United Arab Emirates, and Uzbekistan.

245. U.N. Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: The Netherlands*, ¶¶ 29, 40, U.N. Doc. A/HRC/8/31, (May 13, 2008), available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/NL/A_HRC_8_31_Netherlands_E.pdf.

246. See G.A., *Draft Report of the Human Rights Council on its eighth session*, U.N. Doc. A/HRC/8/L.10/Rev.1, (Aug. 5, 2008).

247. *Fägerskiöld v Sweden*, 37664/04 Eur. Ct. H.R. (2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829981&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

248. *Id.*

249. European Convention on Human Rights, ETS 5 [hereinafter Convention], arts. 1, 8.

250. See *id.* at art. 8.

251. *Fägerskiöld*, *supra* note 247.

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.²⁵²

In *Mazibuko & Others v. City of Johannesburg & Others*,²⁵³ the South African court upheld the right of poor residents to water in the Phiri Township in Johannesburg. Paragraphs thirty-one through forty-seven and eighty-five through ninety-one of the decision discussed the applicability of international law in South Africa, ultimately deciding on a strong international norm favoring water as a human right. The court noted that a "court is obliged, when interpreting the . . . Bill of Rights, to consider international law."²⁵⁴ The court determined that Articles 11 and 12 of the International Convention on Economic, Social, and Cultural Rights (ICESCR) implicitly recognize the right to an adequate standard of living and continued improvement and the right to enjoy the highest attainable standard of physical and mental health.²⁵⁵ The court also determined the ICESCR Committee's General Comment 15 emphasizes both the availability of water (water supply must be sufficient and continuous) and the accessibility of water (including non-discriminatory physical and economic accessibility).²⁵⁶

The court confirmed that the State has a positive duty to ensure progressive realization of the right to water, and to prohibit unjustified retrogressive policies unless warranted in reference to the totality of the rights protected under the ICESCR.²⁵⁷ Article 24 of the Convention on the Rights of the Child and Article 14 of the African Convention on the Rights of the Child identically obligate states to ensure the highest possible standard of children's health.²⁵⁸ Failure to supply basic services, such as safe drinking water, to the population violates Article 16 of the African Charter.²⁵⁹ After weighing these international treaties and precedents, the court concluded "the State is obliged to provide free basic water to the poor,"²⁶⁰ and under Section 27(2) of the Constitution and the Water Services Act²⁶¹ to "take reasonable legislative and other measures within its available resources to achieve the progressive realization of everyone's right to access to sufficient water."²⁶²

252. See S. Afr. Const. 1996, art. 27(1)(b). For other constitutional provisions on rights to access water, see John Scanlon et al., *Water as a Human Right?*, IUCN Envtl. Policy & Law Paper No. 51, (2004) at 42-46, available at http://www.worldwatercouncil.org/fileadmin/www/Programs/Right_to_Water/Pdf_doct/RTW_IUCN1.pdf. See also S. Afr. Const. 1996, § 24 (environmental rights).

253. *Mazibuko v. City of Johannesburg*, 2008 (4) All SA 471 (W) (S. Afr.).

254. *Id.* at ¶ 32 (citing *Residents of Bon Vista Mansions v S. Metro. Local Council*, 2006 (6) BCLR 625 (W) (S. Afr.)).

255. *Id.* at ¶ 35.

256. *Id.* at ¶ 36.

257. *Id.* at ¶ 37.

258. *Id.* at ¶ 38.

259. *Id.* at ¶ 39.

260. *Id.* at ¶ 40.

261. See S. Afr. Water Services Act 108 of 1997. Article 3 states that "everyone has a right of access to basic water supply and sanitation" and requires utilities to take reasonable steps to ensure the right to water. SALMAN M. A. SALMAN & SIOBHAN ALICE MCINERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS* 80 (2004).

262. *Mazibuko*, *supra* note 253, ¶ 98.

The court decided at paragraph 106 that lack of genuine consultation by the water authorities with the affected stakeholders violated the requirements of administrative justice.²⁶³ The court thus confirmed that public participation is paramount to a comprehensive, transparent national water policy. The court discussed in paragraph 124 the importance of water to fulfillment of human rights obligations and to sustenance of life: "Water is life. Life without water is not life. One cannot speak of a dignified human existence if one is denied access to water. The right to water is the bedrock of most of the rights contained in the Bill of Rights."²⁶⁴

In summary, the court found that a human right to water exists and the South African government has a duty to ensure the right to water is enforced. The court's decision fits with an increasing number of treaties, declarations, and court decisions that have recognized the human right to water.²⁶⁵

XVI. Stoning in Iran

Stoning, officially known as lapidation, is a gruesome form of capital punishment in which an organized group throws rocks at an individual until he or she dies, a process that can be slow and painful. Although associated with ancient times, stoning in 2008 was provided for by the criminal codes of Iran, United Arab Emirates, Sudan, Saudi Arabia, one province in Indonesia, two federal states of Malaysia, and twelve federal states of Nigeria.²⁶⁶ In 2008, extra-judicial stoning was reported in Iraqi Kurdistan and Somalia.²⁶⁷ Iran's penal code provides the most complete legal formula for this punishment.²⁶⁸

In August 2008, Iran's judiciary announced suspension of Iran's practice of stoning.²⁶⁹ At the time, at least eight Iranian prisoners were awaiting fulfillment of their stoning sentences.²⁷⁰ The Iranian judiciary announced that four prisoners' stoning sentences were commuted (two prisoners were to receive lashes, and two prisoners were to be incarcerated for ten years), and the sentences of the remaining five prisoners were to be reviewed.

Because higher courts do not have uniform control over lower courts, and individual judges may mandate their interpretation of the letter of the law, even if it contravenes the judiciary head, an Iranian lower court may still sentence stoning despite the August 2008

263. *Id.* at ¶ 106.

264. *Id.* at ¶ 124.

265. See U.N. Econ. & Soc. Council (ECOSOC), General Comment No. 15: The Right to Water, 2-3 n.5, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

266. Sanaz Alasti, *Comparative Study of Stoning Punishment in the Religions of Islam and Judaism*, 4 JUSTICE POL'Y J. 4, at 5, available at http://www.cjcl.org/files/comparative_study_0.pdf.

267. Du'a Khalil Aswad, *The Global Campaign to Stop Killing and Stoning Women!*, Aug. 22, 2008, <http://stop-stoning.org/node/240>; Asha Ibrahim Dhuhulow, *The Global Campaign to Stop Killing and Stoning Women!*, Oct. 29, 2008, <http://stop-stoning.org/node/411>.

268. Alasti, *supra* note 266, at 4. After the Islamic revolution of 1979 Iranian laws were overhauled to conform to the principles of the Islamic regime. It was not until 1983 and the adoption of the contemporary Islamic Iranian Penal Code that stoning was legally endorsed. Terman, *infra* note 271, at 3.

269. Press Release, Amnesty International, Iranian Government Must Ensure Suspension of Stoning is Not a Hollow Promise, Urges Amnesty International (Aug. 6, 2008), <http://www.amnestyusa.org/document.php?id=ENGUSA20080806002>.

270. *Iranians Suspend Death by Stoning*, BBC News, Aug. 5, 2008, <http://news.bbc.co.uk/1/hi/world/middle-east/7543791.stm>.

suspension.²⁷¹ In December 2002, under the direction of Ayatollah Shahroudi (head of the Iranian judiciary), a directive was sent to judges ordering a moratorium on stoning,²⁷² but the Iranian Penal Code still allowed stoning.²⁷³ Reports of stoning have ceased, but just as stoning resurfaced in 2006 after the earlier moratorium, it is uncertain whether the 2008 moratorium will last.

Article 83 of the Iranian Penal Code prescribes stoning for adultery.²⁷⁴ The penal code defines adultery as a married man or married woman having intercourse with another,²⁷⁵ and categorizes adultery as a *bodoud*²⁷⁶ crime, or a crime against divine will.²⁷⁷ Punishment for *bodoud* crimes is fixed by the Quran and Sunnah²⁷⁸ and, in principle, cannot be altered by any authority.²⁷⁹ The Quran is silent about stoning; but justification for the penalty was based upon the *Hadith*, or the traditions of the words and deeds of the Prophet Muhammad.²⁸⁰ Whether Islam endorses stoning today is a point of disagreement.²⁸¹

Evidentiary standards for proving adultery under the Iranian Penal Code appear high, but Article 105 gives judges the absolute right to sentence stoning based on the judge's subjective belief.²⁸² Otherwise, a conviction must be based upon (i) four male witnesses, (ii) three male and two female witnesses, each of whom profess to be eyewitnesses to the crime,²⁸³ or (iii) the accused person's own confession given at least four times.²⁸⁴

In 2007, after Iran's most recent recorded stoning, the Iranian judiciary maintained it would not be "bullied" by the West and asserted, "We are not bound by the pressures of the international human rights [groups]. We are only bound by our Sharia and law."²⁸⁵ A spokesperson for the judiciary argued that Iran had a duty to act in its best interest and to practice Iranian laws regardless of international pressure. The August 2008 suspension of stoning was a significant legal development, but the eradication of stoning from the Iranian legal code remains a task for the future.²⁸⁶

271. Email from Rochelle Terman, Women Living Under Muslim Laws, Stop Stoning Forever Campaign, to Genessa Stout (Oct. 28, 2008, 03:18 PST) (on file with author).

272. Iran: End Executions by Stoning, AMNESTY INTERNATIONAL, Jan. 2008, <http://www.amnesty.org/en/library/asset/MDE13/001/2008/en/2b087fb2-c2d2-11dc-ac4a-8d7763206e82/mde130012008eng.pdf>.

273. *Id.* at app. 2.

274. *Id.* at 3.

275. *Id.* at app. 2, art. 83.

276. Some transliterations of this word are *budud* instead of *bodoud*.

277. Iran: End Executions by Stoning, *supra* note 272.

278. Sunnah denotes the way the Prophet Muhammad lived his life. The Quran is the first source of Islamic jurisprudence, and the Sunnah is the second.

279. Alasti, *supra* note 266, at 6.

280. *Id.* at 6-7.

281. See 'Practice of the Stoning Is In Our Laws' Interview with Shirin Ebadi, Stop Stoning Forever Campaign, Jan. 1, 2007, <http://www.meydaan.com/English/showarticle.aspx?arid=133&cid=46> (trans. by Shahpoour S.).

282. Iran: End Executions by Stoning, *supra* note 272, at 6.

283. Alasti, *supra* note 266, at 3.

284. *Id.* at 13.

285. Shabnam Rahmati, Interview: Judiciary Spokesman on Stoning of Jafar Kiani, Stop Stoning Forever Campaign (July 11, 2007), <http://www.meydaan.com/English/showarticle.aspx?arid=293> (trans. by Navid Vafaei).

286. See Mehrangiz Kar, A Brief History of Grassroots Struggles to End Stoning (Aug. 6, 2007), <http://www.meydaan.com/English/showarticle.aspx?arid=320> (trans. by A. Roya).

XVII. Sudan

Although Sudan is obligated to govern in accordance with several international human rights treaties and the U.N. Charter,²⁸⁷ in 2008, Sudan appears to have violated the International Covenant on Civil and Political Rights' (ICCPR) prohibition of arbitrary arrest and detention.²⁸⁸ Arrests are "arbitrary" when conducted based on discrimination or in violation of existing legal procedures. Under the ICCPR, arrestees or detainees have the right to be informed promptly of the nature of the charges against them, the right to adequate time and facilities for preparation of their defense, and the right to communication with counsel of their choice.

On May 10, 2008, after rebels from the Darfur-based rebel group, Justice and Equality Movement (JEM) attacked Omdurman, Sudan detained hundreds of people, but did not inform their families of their whereabouts or the outcome of their detention for months, if at all.²⁸⁹ Most arrestees were from the Darfur region, suggesting discrimination.²⁹⁰

The government set up Anti-Terrorism Special Courts to try individuals accused of participating in the May 10, 2008 attacks,²⁹¹ but the proceedings did not meet minimum international fair trial standards.²⁹² Several detainees reported that Sudanese authorities subjected them to cruel and inhumane treatment,²⁹³ and there were numerous eyewitness accounts of torture and degrading treatment.²⁹⁴

Approximately eighty-nine children were arrested, including some as young as eight. Most showed signs of abuse. Sudan thus violated the Convention on the Rights of the Child (CRC), which provides that children should be detained only as a last resort and should be protected from arbitrary arrest.²⁹⁵

287. Sudan is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Slavery Convention, as amended, the Supplementary Convention on the Abolition of Slavery, the Convention relating to the Status of Refugees and its additional protocols, and the African Charter on Human and People's Rights. See Human Rights Watch, *"In the Name of God:" Repression Continues in Northern Sudan*, vol. 6, 3-4 n. 2, (Nov. 1994), available at <http://www.hrw.org/en/reports/1994/11/01/name-god>.

288. Int'l Covenant on Civil and Political Rights arts. 2, 9, 14, Dec. 16, 1966, 999 U.N.T.S. 171.

289. See *Sudan: End Unfair Trials*, Human Rights Watch, June 24, 2008, available at <http://www.hrw.org/en/news/2008/06/24/sudan-end-unfair-trials>.

290. See *Sudan: Account for Civilians Arrested in Khartoum*, Human Rights Watch, June 16, 2008, available at <http://www.hrw.org/en/news/2008/06/16/sudan-account-civilians-arrested-khartoum>.

291. See *Crackdown in Khartoum: Mass Arrests, Torture, and Disappearances Since the May 10 Attack, Government Response to JEM Attacks*, Human Rights Watch, June 16, 2008, available at <http://www.hrw.org/en/node/62163/section/7>.

292. See *Sudan: End Unfair Trials*, *supra* note 289.

293. See *Crackdown in Khartoum*, *supra* note 291.

294. *Id.*; Interim National Constitution of the Republic of the Sudan, adopted July 10, 2005, art. 33, available at http://www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf; ICCPR, *supra* note 289, art. 7.

295. Convention on the Rights of the Children, adopted Nov. 20, 1989, ¶ 37, U.N. Doc. A/44/49 (Sept. 2, 1990).

XVIII. U.S. Alien Tort Claims Act (ATCA), Torture Victim Protection Act (TVPA), and Foreign Sovereign Immunities Act (FSIA)

In 2008, there were significant U.S. case law developments under the Alien Tort Claims Act of 1789 (ATCA), the Torture Victims Protection Act of 1991 (TVPA), and the Foreign Sovereign Immunities Act (FSIA)

A. CASE DEVELOPMENTS

The ATCA grants jurisdiction to U.S. federal district courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁹⁶ Since the early 1980s, the ATCA has been used in civil suits against individuals and multinational corporations for breaching international human rights law norms.

On March 4, 2008, the U.S. District Court for the Southern District of Florida ordered a Peruvian to pay \$37 million for his involvement in a massacre in Peru.²⁹⁷ *Lizarbe v. Hurtado* was brought under the ATCA and TVPA²⁹⁸ against a Peruvian former Major, Telmo Hurtado Hurtado, by two plaintiffs and the estates of family members killed during the Accomarca massacre on August 14, 1985.²⁹⁹ Peruvian military forces under Hurtado’s command went to the Accomarca region looking for members of the Shining Path (*Sendero Luminoso*), a terrorist group dedicated to overthrowing the government. The Peruvian forces did not find the Shining Path but rounded up village residents and, on Hurtado’s orders, brutally beat the men, raped several of the women, and killed over sixty people with machine-gun fire and grenades.³⁰⁰ Plaintiffs, age twelve at the time of the attack in 1985, survived the massacre.

In 1992, Hurtado was found guilty of abuse of authority by a Peruvian military tribunal and sentenced to six years in prison.³⁰¹ However, he served no prison time because then-president Fujimori and the Peruvian Congress granted a blanket amnesty.³⁰² In 2007, plaintiffs sued in Florida alleging torture, war crimes, and crimes against humanity. The court entered a default judgment on liability against Hurtado,³⁰³ who attended a bench trial on damages but invoked his Fifth Amendment privilege against self-incrimination and declined to participate.³⁰⁴ The District Court, noting that the ATCA was jurisdictional in nature and did not create substantive rights,³⁰⁵ looked to the TVPA and prior case law, and determined that federal common law applied to damages under the TVPA and included damages for wrongful death, pain and suffering, and punitive damages.³⁰⁶

296. 28 U.S.C. § 1350 (2008).

297. *Lizarbe, v. Hurtado*, No. 07-21783, slip op. at 1-5 (S.D. Fla. Mar. 4, 2008) (Order on Damages).

298. 28 U.S.C. § 1350 (2008).

299. *Lizarbe*, *supra* note 297, at 1.

300. *Id.* at 2.

301. *Id.* at 3.

302. *Id.* at 3-4.

303. *Id.* at 1; Complaint for Damages, *Lizarbe, et al. v. Hurtado*, No. 07-21783 (S.D. Fla. July 11, 2007).

304. Order on Damages, *supra* note 297, at 1.

305. *Id.* at 4; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

306. *Id.* at 4-5.

On May 20, 2008, a First Amended Complaint was filed on behalf of Emad Al-Janabi, a forty-three year-old Iraqi blacksmith, in *Al-Janabi v. Stefanowicz*,³⁰⁷ alleging that Al-Janabi was abducted from his home by people in U.S. military uniforms and civilian clothing in September 2003.³⁰⁸ He was allegedly tortured and taken to Abu Ghraib prison where he remained for almost a year and where he was repeatedly tortured and subjected to cruel, inhuman, or degrading treatment.³⁰⁹ The complaint was filed under the ATCA against: CACI International (a firm that provided interrogation services to the U.S. government in Iraq); CACI Premier Technology (a wholly-owned subsidiary and alter ego of CACI International); Steven Stefanowicz (an interrogator employed by CACI International who worked at Abu Ghraib prison); and L-3 Services (a firm that provided civilian translators to the U.S. military in Iraq).³¹⁰

On September 24, 2008, the U.S. Court of Appeals for the Ninth Circuit affirmed a decision dismissing the plaintiffs' claims of genocide and crimes against humanity in *Abagninin v. AMVAC*.³¹¹ The plaintiffs were West African nationals who resided on and worked at banana and pineapple plantations in the Ivory Coast.³¹² The suit was filed under ATCA against the manufacturers, distributors, and users of the pesticide DBCP,³¹³ and alleged that defendants knew the pesticide caused male sterility and low sperm counts and prevented births.³¹⁴

Plaintiffs claimed they need not show defendants acted with "specific intent" to commit genocide, citing the Rome Statute for the proposition that to prove a claim of genocide, one must only show "knowledge" that genocide would occur.³¹⁵ The Court found that "[n]o treaty of the United States, no controlling act of the President or Congress, and no judicial decision indicate[d] that genocide [was] a knowledge-based norm," and the plaintiffs had not alleged that the defendants had acted with specific intent. Thus, it affirmed the decision dismissing plaintiff's genocide claims.³¹⁶

In affirming the dismissal of claims alleging crimes against humanity, the Ninth Circuit looked to Article 7(2) of the Rome Statute, which states that for a crime against humanity to be directed against a civilian population, there must be a course of conduct pursuant to or in furtherance of a "State or organizational policy" to commit such an attack.³¹⁷ The Court noted that the defendants were not a State or State-like organization and that the plaintiffs had failed to allege facts sufficient for crimes against humanity.³¹⁸

On December 1, 2008, nine jurors unanimously delivered a defense verdict in *Bowoto v. Chevron Corp.*, a case under the ACTA and other statutes alleging Chevron's involvement in the deaths and injuries of Nigerians. Plaintiffs originally filed suit in 1999 under the

307. See First Amended Complaint for Damages, *Al-Janabi v. Stefanowicz*, No. 2:08-cv-02913 (C.D. Cal. May 20, 2008) (Complaint).

308. *Id.* at 5.

309. *Id.* at 7-9.

310. *Id.* at 4-5.

311. *Abagninin, et al. v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008).

312. *Id.* at 735.

313. *Id.* at 735-36.

314. *Id.* at 736.

315. *Id.* at 738.

316. *Id.* at 738.

317. *Id.* at 741.

318. *Id.* at 741.

ATCA, TVPA, RICO,³¹⁹ California law, and Nigerian law for murder, crimes against humanity, and cruel, inhuman or degrading treatment.³²⁰ The case arose out of an alleged attack on May 28, 1998, at a Chevron Nigeria Ltd. (CNL) offshore drilling platform known as the "Parabe platform."³²¹ The plaintiffs alleged that over 100 representatives from a nearby community occupied the platform for three days attempting peacefully to meet with Chevron officials to address Chevron's environmental practices and to request jobs, training, and assistance.³²² The plaintiffs further alleged that CNL sought assistance from the Nigerian Government Security Forces to oust the protesters, and CNL provided helicopters to transport Nigerian forces to the platform, who then attacked the protesters, killing two, injuring two others, and torturing others after the attack.³²³

On August 8, 2007, the U.S. District Court of the Northern District of California dismissed defendants' motion for summary judgment on the Act of State defense but upheld defendants' motion for summary judgment on the crimes against humanity claim.³²⁴ Regarding the Act of State defense, the Court found that the defendants had not met their burden of showing that the acts of the Nigerian parties constituted an "official act of a foreign sovereign performed within its own territory."³²⁵ In dismissing the crimes against humanity charges, the Court found that "sporadic episodes of violence against communities perceived to be engaging in protest, over a long period and among an extremely large population" failed to meet the required elements.³²⁶

B. FOREIGN SOVEREIGN IMMUNITY ACT DEFENSES

In a few cases in 2008, U.S. federal courts considered whether the Foreign Sovereign Immunity Act of 1976 (FSIA)³²⁷ bars suits filed under the ATCA³²⁸ and TVPA³²⁹ against

319. 18 U.S.C. § 1964 (b)-(d).

320. Plaintiff's Tenth Amended Complaint for Damages, *Bowoto v. Chevron Corp.*, No. C 99-02506, slip op. at 106 (N.D. Cal. June 5, 2008); *Bowoto v. Chevron Corp.*, No. C 99-02506 (N.D. Cal. Aug. 14, 2007) (Order Granting Defendant's Motion for Summary Judgment on Plaintiffs' Crimes Against Humanity Claim).

321. See *Bowoto v. Chevron Corp.*, No. C 99-02506 (N.D. Cal. Aug. 14, 2007) (Order Granting Defendant's Motion for Summary Judgment on Plaintiffs' Crimes Against Humanity Claim).

322. Plaintiff's Tenth Amended Complaint for Damages, *Bowoto v. Chevron Corp.*, No. C 99-02506, at 78 (N.D. Cal. June 5, 2008).

323. *Id.* at 80-86; see also *Bowoto v. Chevron Corp.*, No. C 99-02506, at 2 (N.D. Cal. Aug. 14, 2007) (Order Granting Defendant's Motion for Summary Judgment on Plaintiffs' Crimes Against Humanity Claim).

324. *Bowoto v. Chevron Corp.*, No. C 99-02506 (N.D. Cal. Aug. 14, 2007) (Order Granting Defendant's Motion for Summary Judgment on Plaintiffs' Crimes Against Humanity Claim); *Bowoto v. Chevron Corp.*, No. C 99-02506 (N.D. Cal. Aug. 14, 2007) (Order re: Cross-Motions for Summary Judgment on the Act of State Defense; and Defendants' Renewed Motion for the Court to Request the Views of the U.S.).

325. *Bowoto v. Chevron Corp.*, No. C 99-02506, at 12 (N.D. Cal. Aug. 14, 2007) (Order Re: Cross-Motions for Summary Judgment on the Act of State Defense).

326. *Bowoto v. Chevron Corp.*, No. C 99-02506, at 15 (N.D. Cal. Aug. 14, 2007) (Order Granting Defendant's Motion for Summary Judgment on Plaintiffs' Crimes Against Humanity Claim).

327. 28 U.S.C. §§ 1602-11. The FSIA is the exclusive source of subject matter jurisdiction over all civil actions in the United States against foreign states. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989). Courts have construed the immunity afforded by the statute to extend to an individual acting in his official capacity on behalf of a foreign state because "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004) (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-02 (9th Cir.

foreign governmental officials. In two cases, *Belhas v. Ya'alon*³³⁰ and *Weixum v. Bo Xilai*,³³¹ U.S. federal courts dismissed suits filed under the ATCA and TVPA on the basis that the defendants were immune under the FSIA.

Belhas v. Ya'alon was filed by victims of Israeli bombing in southern Lebanon, alleging war crimes, extrajudicial killing, crimes against humanity, and inhumane treatment by an Israeli Military general who headed Israeli Army Intelligence when the alleged crimes occurred.³³² The U.S. Court of Appeals for the District of Columbia affirmed the lower court's dismissal of the suit, holding that the general was entitled to immunity under the FSIA since the general's acts were performed "in the course of [his] official duties" and thus were not private in nature,³³³ even though his actions may have violated Israel's domestic laws.³³⁴ Moreover, the court refused to recognize either (i) actions contrary to *jus cogens* norms of international law or (ii) the later-in-time passage of the TVPA as implied exceptions to FSIA immunities.³³⁵

In *Weixum v. Bo Xilai*, Chinese Falon Gong practitioners brought action under the ATCA and TVPA against defendant Bo Xilai in the U.S. District Court for the District of Columbia for human rights abuses that occurred while the defendant was governor of Liaoning Province in the People's Republic of China (PRC) from 2001 to 2004.³³⁶ In a statement of interest submitted to the court, the U.S. Department of State concluded that when the suit was filed, the defendant was visiting Washington, D.C., as an official PRC envoy on a special diplomatic mission to the annual meeting of the U.S.-China Joint Commission on Commerce and Trade.³³⁷ The court held that the defendant was immune from service of process and thus not subject to the court's jurisdiction on the grounds that the President's power to receive ambassadors under Article II, Section 3, of the U.S. Constitution, as well as general separation-of-power principles, favored deferring to the U.S. Department of State's suggestion of immunity regarding a diplomatic agent.³³⁸

In *Saludes v. Republica de Cuba*,³³⁹ a U.S. federal court abrogated a foreign state's sovereign immunity in a civil suit alleging human rights abuses. In that case, a plaintiff mother and her son sued the Republic of Cuba, various Cuban governmental officials, and the Communist Party of Cuba under the ATCA and TVPA in connection with Cuba's alleged torture, unlawful arrest, and arbitrary detention of the son.³⁴⁰ After Cuba failed to respond to the complaint, the mother moved for a default judgment on her claim for intentional infliction of emotional distress. Recognizing that courts adjudicating claims against foreign governments must first establish that an exception to the FSIA is present before

1990)). As such, immunity is not extended to "an official who acts beyond the scope of his authority." *Velasco*, 370 F.3d at 399 (citing *Chuidian*, 912 F.2d at 1106).

328. 28 U.S.C. § 1350.

329. *Id.*

330. *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008).

331. *Weixum v. Bo Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008).

332. *Belhas*, 515 F.3d at 1282-83.

333. *Id.* at 1283-84.

334. *Id.* at 1288.

335. *Id.* 1288-89.

336. *Weixum*, 568 F. Supp. 2d at 36.

337. *Id.* at 38.

338. *Id.* at 38-39.

339. *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243 (S.D. Fla. 2008).

340. *Id.* at 1245.

proceeding, the court observed that, pursuant to 28 U.S.C. § 1605(a)(7), a foreign state that engages in certain human rights abuses and acts of terrorism is not entitled to sovereign immunity in a suit seeking money damages if the state is designated as a state sponsor of terrorism, the state has had a reasonable opportunity to litigate the claim, and the claimant or victim is a U.S. national at the time the alleged act occurs.³⁴¹ Because these conditions were met, the court reasoned Cuba had waived its sovereign immunity in this case.³⁴² The court held that the mother had established her right to relief and entered judgment in her favor.³⁴³

XIX. Indigenous Peoples

Indigenous peoples' rights have been increasingly threatened by social and technological development. In 2008, these concerns were addressed by a newly appointed U.N. Special Rapporteur, Professor S. James Anaya,³⁴⁴ and by the Latin American Water Tribunal (LAWT).

A. U.N. SPECIAL RAPPOURTEUR ON HUMAN RIGHTS OF INDIGENOUS PEOPLES

In August 2008, the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor S. James Anaya, circulated to the U.N. General Assembly the Addendum to his report on the *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*.³⁴⁵ The Addendum revealed a pattern of violations resulting from the failure to consult with indigenous peoples or secure their consent on development projects likely to affect them.³⁴⁶

During the most recent reporting period, the Special Rapporteur sent out thirty-nine communications and received nineteen substantive responses from governments around the world. Some responses directly addressed the relevant issue so further action or monitoring by the Special Rapporteur was unnecessary.³⁴⁷ In other instances, the Special Rapporteur indicated a need to continue to monitor violations. For instance, the Special Rapporteur sent an information request to the People's Republic of China after receiving a letter alleging that infrastructure projects, mining activities, and hydropower projects

341. *Id.* at 1251.

342. *Id.* at 1251-55.

343. *Id.* at 1255.

344. Prof. Anaya assumed the mandate of Special Rapporteur on May 1, 2008. See Office of the United Nations High Commission for Human Rights, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, <http://www2.ohchr.org/english/issues/indigenous/rappporteur/> (last visited Apr. 1, 2008).

345. S. James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, United Nations General Assembly, Ninth Session, Agenda item 3, at 4, (The Special Rapporteur gathers, requests, receives, and exchanges information from governments, indigenous peoples, communities, organizations, and other sources regarding alleged violations of indigenous peoples' human rights and fundamental freedoms.) (also, the Special Rapporteur formulates recommendations and proposals to prevent and remedy violations of indigenous peoples' rights and freedoms.), <http://daccessdds.un.org/doc/UNDOC/GEN/G08/150/81/PDF/G0815081.pdf?OpenElement>.

346. See *id.* at 5-6.

347. See *id.* at 6-7, 9, 10.

were causing indigenous peoples in Tibet to be evicted and forced to abandon their traditional way of life, causing impoverishment and marginalization.³⁴⁸ China responded that development projects were undertaken to improve the lives of Tibetan people and that it supported Tibetan livelihoods, customs, and cultures.³⁴⁹ The Special Rapporteur stated that he will continue to closely monitor the situation, and he urged China to ensure that these projects do not infringe on the rights of the Tibetan people.³⁵⁰

The Special Rapporteur identified concerns about the Hydroelectric Project La Parota in Mexico.³⁵¹ Mexico had undertaken several international human rights commitments, including International Labour Organization Convention 169, which requires that indigenous communities be consulted when governmental development projects will affect them.³⁵² The Special Rapporteur reminded Mexico of its obligations to consider all possible alternatives that would satisfy the need for the project without negatively affecting human rights and encouraged the government to work with indigenous peoples to devise joint strategies for regional development.³⁵³ In response, Mexico committed to develop a project that would be acceptable to affected indigenous peoples.³⁵⁴

Twenty of thirty-nine countries, more than fifty percent, did not respond to the Special Rapporteur's information requests, suggesting potential concerns about indigenous peoples' rights in those countries. Peru did not respond to a query about how the sale and development of petroleum reserves in Peru may negatively impact food security, ground-water supply, and the lives of indigenous communities in reserve areas.³⁵⁵ The Lao People's Democratic Republic also failed to respond to an inquiry regarding the potential impact of the construction of the Nam Theun Dam 2 on the rights of indigenous communities,³⁵⁶ including how the dam's construction would affect the food security, traditional livelihood, and other rights of the peoples of the Nakai Plateau.

B. LATIN AMERICAN WATER TRIBUNAL

The Latin American Water Tribunal (LAWT) is an independent, international organization created to resolve water-related conflicts in Latin America, taking into account the need to protect human rights.³⁵⁷ LAWT claims legitimacy from "the moral nature of its resolutions and the juridical fundamentals they are based on." It relies heavily on various international instruments. Its verdicts are not binding, but they are used to aid in negotiations and dispute resolution.

In 2008, the Tribunal ruled on several issues involving development projects that threatened indigenous rights to adequate and safe water supplies.

In Guatemala, the Montana Exploradora de Guatemala S.A. company initiated a gold mining open pit project despite the Mayan-Sipakapan indigenous community's referen-

348. *See id.* at 73-74.

349. *See id.* at 74-76.

350. *See id.* at 76.

351. *See id.* at 91.

352. *Id.* at 102-03.

353. *See id.* at 105-06.

354. *See id.* at 110-11.

355. *See id.* at 78-79.

356. *See id.* at 50-52.

357. Latin American Water Tribunal, <http://www.tragua.com/en/>.

dum in opposition.³⁵⁸ The exploitation of the mine would result in deforestation, significant waste, leached rock, rock acid drainage, and increased water scarcity. LAWT recognized “[t]he universal acknowledgment of water in adequate quantity and quality as a fundamental human right whose plain exercise must be enforced by the Governments,” and noted that water is a dominant element in indigenous beliefs. LAWT found Guatemala had failed to effectuate Convention 169 of the International Labour Organization, which obligates governments to determine the social, spiritual, cultural, and environmental effects development might have on concerned peoples. LAWT also found that Guatemala had not respected the indigenous peoples’ juridical system. LAWT censured the government for failing to enforce ILO Convention 169, the Rio de Janeiro’s Declaration on Development and Environment, and the Accord on Indigenous Peoples’ Identity and Rights. Further, LAWT recommended that Guatemala reform its mining laws to guarantee indigenous peoples’ rights and patrimonial protection and to conform to the government’s obligations under ILO Convention 169.

LAWT censured the Brazilian government and recommended that indigenous peoples participate in studying the impact of proposed hydroelectric power dams in the Madeira River Basin.³⁵⁹ The LAWT went further in a case against El Salvador involving the construction of a hydroelectric power dam and waste waters affecting the Pushtan and Sisimitepet communities. In that case, LAWT not only held the government responsible for the contamination and recommended that it consult with concerned peoples and seek alternatives with decreased impacts, but also LAWT also urged the government to acknowledge the existence of indigenous peoples in El Salvador and ratify ILO Convention 169 on indigenous peoples’ rights.³⁶⁰

Although LAWT’s ruling are non-binding, LAWT provides indigenous communities the opportunity to confront governments on rights violations resulting from development projects, and it helps raise the international profile of their struggles. Javier Bogantes, LAWT’s director, stated, “the number of cases we have received for consideration demonstrates our legitimacy, and shows that in the face of the legal vacuum, this Tribunal has a role to play.”³⁶¹

XX. Roma in Italy

In a significant new development, the Italian government announced on June 25, 2008, that it would fingerprint all Roma and Sinti, including children, in three Italian regions

358. Latin American Water Tribunal, *Case: Open pit mining in the Cuilco and Tzala river basins. Sipacapa and San Miguel Ixtahuacan Districts, San Marcos Department Guatemala* (Sept. 12, 2008), available at <http://www.tragua.com/archivos-tla/audiencia-2008-guatemala/veredictos-ing/veredicto-rio-cuilco-ingles.pdf>.

359. Latin American Water Tribunal, *Case: Construction of large scale hydroelectric power dams on Madeira River. State of Rondonia, Brazil* (Sept. 12, 2008), available at <http://www.tragua.com/archivos-tla/audiencia-2008-guatemala/veredictos-ing/veredicto-rio-madeira-ingles.pdf>.

360. Latin American Water Tribunal, *Case: Sensunapan River deterioration from farming waste waters and for the construction of a hydroelectric power dam. Nabuizalco District, Sonsonate Department El Salvador* (Sept. 12, 2008), available at <http://www.tragua.com/archivos-tla/audiencia-2008-guatemala/veredictos-ing/veredicto-rio-sensunapan-ingles.pdf>.

361. See Diego Cevallos, *Latin America: Water Polluters “on Trial”*, INTER PRESS SERVICE NEWS AGENCY (Mar. 15, 2006), available at <http://ipsnews.net/news.asp?idnews=32515>.

where a "Roma emergency" existed.³⁶² The Italian Interior Minister, Roberto Maroni, announced plans to send police³⁶³ into all "nomad camps"³⁶⁴ around Italy to collect fingerprints of all residents, both adults and children.³⁶⁵ The government later claimed the fingerprinting would be carried out in accordance with the law and would not focus on the Roma.³⁶⁶ Michele Cerccone from the European Commission stated:

[The EC is] satisfied that in conducting a census of Roma gypsies in camps as part of its crackdown on street crime since coming to power in May, the Berlusconi Government was not seeking "data based on ethnic origin or religion." The controversial programme had the sole aim of "identifying persons who cannot be identified in any other way."³⁶⁷

Advocate Michael Smith, a Roma himself, argued the decision that finger printing was not racist³⁶⁸ but within the law was akin to declaring all Roma to be outlaws and criminals as the Nazis did in preparation for extermination. The U.S. Helsinki Commission co-chair, Rep. Hastings, expressed alarm about the fingerprinting,³⁶⁹ and the European Parliament passed a resolution on July 10, 2008, urging Italian authorities to refrain from the fingerprinting program as it would constitute direct discrimination under Article 14 of the European Convention on Human Rights, the Council Directive 2000/43/EC, and Articles 12, 13, and 17 to 22 of the EC Treaty.³⁷⁰ The Resolution expressed concern regarding the

362. See Council Directive 95/46/EC on the protection of personal data, Art. 8(1) (Personal data is closely protected in Europe after the Holocaust, when the Roma were identified for persecution).

363. Franco Frattini, *Roma must respect the laws of Italy*, FINANCIAL TIMES, June 6, 2008, <http://www.erionet.org/site/upload/publications/enews/e-news,%2016%20June%202008.pdf>.

364. The European Roma Rights Centre: The Centre on Housing Rights and Evictions, Associazione Studi Giuridici, The European Roma Grassroots, *Memorandum: Request for Expedited Engagement of Follow-Up Procedure and/or Urgent Action/Early Warning Procedure Concerning Italy ICERD Compliance Petitioning Organisations*, available at <http://www.errc.org/db/03/1D//m0000031D.pdf>. See also OsservAzione, Centre for Action Research against Roma and Sinti Discrimination, The National Roma Centrum, The Cultural Center "O Del Amenca," The Policy Center for Roma and Minorities, The Roma Center for Social Intervention and Studies [hereinafter "Romani CRISS"], The Roma Women Association in Romania, available at <http://www.errc.org>.

365. Letter from ERRC and Justice Initiative to Mr. Jacques Barrot, Vice-President of the European Commission (Sept. 8, 2008), available at <http://www.statewatch.org/news/2008/sep/italy-roma-osi.pdf>.

366. Guy Dinmore, *Italy denies finger-printing of Gypsies is Racist*, FINANCIAL TIMES, July 11, 2008.

367. Fillip Monteforte, *EU Clears Berlusconi over Roma Gypsies*, TIMES ONLINE, Sept. 4, 2008, <http://www.timesonline.co.uk/tol/news/uk/article4674724.ece>.

368. *Fingerprint all Italians, Minister Says*, EU BUSINESS, July 11, 2008, <http://www.eubusiness.com/news-eu/1215768938.64>.

369. "The blatant racial profiling of Roma by the Italian government sets a very dangerous precedent and turns back the clock to one of Europe's darkest times. The government's actions may only exacerbate acts of intolerance by the general public. I urge the government to immediately cease this program of fingerprinting Roma." Co-Chair, Senator Cardin, noted: "Singling out Roma for fingerprinting is nothing more than an exercise in racism." Press Release, *Helsinki Commission Co-chairmen Express Alarm Over Fingerprinting of Roma by Italian Authorities*, U.S. Helsinki Commission, July 7, 2008, http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=693&ContentTypes=P&ContentRecordType=P.

370. Resolution on the Census of the Roma on the Basis of Ethnicity in Italy, Eur. Parl. Doc. B6-0348/2008 (2008). While Italy has transposed into domestic law the two major antidiscrimination EC Directives 2000/43 (Racial Equality Directive) and 2000/78 (Employment Framework Directive), the law has not been effectively implemented. Memorandum from Thomas Hammarberg, Comm'r for Human Rights of the Council of Eur., on Roma and Sinti; Immigration An Open Memorandum to the Council of Europe (July 28, 2008) (on file with the Council of Eur.), available at <https://wed.coe.int/ViewDoc.jsp?id=1309811&Site=Comm>

May 21, 2008, emergency decree stating that the presence of Roma was a serious social alarm.³⁷¹

On July 28, 2008, the Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, stated his concern about legislation aimed at ensuring public security and immigration control over the Roma and Sinti populations including EU citizens.³⁷² The U.N. Committee for the Elimination of Racial Discrimination spoke against the racist and xenophobic discourse within Italy.³⁷³ The U.S. Mission to the Organization for Security and Co-operation in Europe (OSCE) stated on October 2, 2008, that "[t]he United States opposes singling out any ethnic, religious or racial group for deportation or fingerprinting or other identification purposes."³⁷⁴ Rudko Kawczynski of The European Roma and Travellers Forum (ERTF) argued the Italian measures would violate equality, non-discrimination, the right to privacy, and data protection, and he called on governments to prevent the Italian authorities from carrying out their plan.³⁷⁵

XXI. Zimbabwe Elections

On March 29, 2008, Morgan Tsvangirai (Tsvangirai) from the Movement for Democratic Change (MDC) challenged incumbent Robert Mugabe (Mugabe) from the Zimbabwe African National Union-Patriotic Front (ZANU-PF) for Zimbabwe's presidency.³⁷⁶ Although Tsvangirai won the majority of votes cast, he did not meet the neces-

DH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&0BackColorLogged=FFC679. In February 2006 anti-racism legislation was modified by Law 85/2006, which seriously reduced the sentences provided for in cases of propaganda advocating racial or ethnic superiority or hatred and instigation to commit or the commission of discriminatory or violent acts on racial, ethnic, national or religious grounds. *Id.*

371. Resolution on the Census of the Roma on the Basis of Ethnicity in Italy, *supra* note 370. Memorandum from The European Roma Rights Centre: The Centre on Housing Rights and Evictions, Associazione Studi Giuridici, The European Roma Grassroots on Italy ICERD Compliance An Open Memorandum to Italy (2008) (on file with author), available at <http://www.errc.org>; See also Press Release, European Roma Rights Centre, Italy Systematically Frustrates Right to Adequate Housing at Roma (April 24, 2006) (on file with author), available at <http://www.errc.org/cikk.php?cikk=2589>

372. Hammarberg, *supra* note 370.

373. Press Release, U.N. Comm. on Elimination of Racial Discrimination Considers Report of Italy (Feb. 21, 2008). Supported by the previous statements made on July 15, 2008 by the U.N. Independent Experts on Racism; Minority Issues and the Human Rights of Migrants, and the statements of the High Commissioner of Human Rights of the United Nations, Commissioner for Human Rights of the Council of Europe and the European Commission against Racism and Intolerance. Hammarberg, *supra* note 370; Press Release, Council of Eur., Statement of the European Comm'n Against Racism and Intolerance on Recent Events Affecting Roma and Immigrants in Italy (June 20, 2008); Press Release, U.N. High Comm'r for Human Rights, Arbour Calls for Justice for Victims of Electoral Violence in Zimbabwe (June 26, 2008); Press Release, U.N. Indep. Experts, Concerned About Stigmatization of the Roma Community in Italy (July 15, 2008).

374. U.S. Mission to the Organization for Security and Co-operation in Europe [OSCE], 6th Sess., OSCE Human Dimension Mtg. on Sustainable Policies of Roma and Sinti Integration at 1, OSCE Doc. HDIM.DEL/209/08 (Oct. 3, 2008).

375. Letter from Rudko Kawczynski, President of the European Roma and Travellers Forum, An Open Letter to All Heads of Governments (July 11, 2008) (on file with author).

376. See HUMAN RIGHTS WATCH, "THEY BEAT ME LIKE A DOG": POLITICAL PROSECUTION OF OPPOSITION ACTIVISTS AND SUPPORTERS IN ZIMBABWE 1 (2008), available at <http://www.hrw.org/reports/2008/zimbabwe0808/zimbabwe0808webcover.pdf>.

sary percentage points to be declared the winner.³⁷⁷ A run-off election was scheduled, but Tsvangirai pulled out of the race because of the intense violence directed at MDC supporters.³⁷⁸ Mugabe was declared the victor and sworn into office.³⁷⁹ Threats were made on Tsvangirai's life during the campaign and MDC officials were subjected to arbitrary arrests and detentions.³⁸⁰ MDC supporters were beaten, shot, and killed; the elderly were not spared.³⁸¹ Women received the brunt of the repressive tactics and were often arrested for participating in peaceful marches.³⁸² In September 2008 the parties tentatively agreed to create a new power-sharing government structure and reaffirm civil and political rights.³⁸³ The talks broke down when the parties were unable to agree upon key cabinet posts, amid public concern that human rights abuse perpetrators might enjoy impunity.³⁸⁴ The U.N. High Commissioner for Human Rights appealed for justice and accountability in the ongoing violence.³⁸⁵

XXII. The Americans with Disabilities Act Amendments Act of 2008³⁸⁶

On September 25, 2008, the Americans with Disabilities Amendments Act of 2008 became law in the United States and amended the Americans with Disabilities Act as of January 1, 2009.³⁸⁷ The Amendments reflect the U.S. Congress's desire to restore the ADA's broad scope of protection that the U.S. Supreme Court had narrowed with its holdings in *Sutton v. United Airlines, Inc.*³⁸⁸ and *Toyota Motor Mfg., Ky. v. Williams*,³⁸⁹ and expressed the U.S. Congress's desire to restore broad protections.

The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."³⁹⁰ The Amendments define the statutory definitions in first and third prongs to allow broad ADA coverage.

377. See HUMAN RIGHTS WATCH, OUR HANDS ARE TIED: EROSION OF THE RULE OF LAW IN ZIMBABWE 10 (2008), available at <http://www.hrw.org/reports/2008/zimbabwe1108/zimbabwe1108webwcover.pdf>.

378. See *id.*

379. See Celia W. Dugger, *After Brutality, Mugabe Offers an Olive Branch*, N.Y. TIMES, June 29, 2008, <http://www.nytimes.com/2008/06/29/world/africa/29zimbabwe.html?scp=2&sq=Zimbabwe%20June%2029,%202008&st=cse>.

380. See HUMAN RIGHTS WATCH, *supra* note 376.

381. *Id.* at 10-11; Dugger, *supra* note 379.

382. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2008: THE STATE OF THE WORLD'S HUMAN RIGHTS: ZIMBABWE 334 (2008), available at <http://thereport.amnesty.org/eng/regions/africa/zimbabwe>.

383. See HUMAN RIGHTS WATCH, *supra* note 376, at 10.

384. See Celia W. Dugger, *Impatient Leaders Call on Zimbabwe to Form a Joint Government*, N.Y. TIMES, Nov. 9, 2008, http://www.nytimes.com/2008/11/10/world/africa/10sadc.html?_r=1&scp=1&sq=Zimbabwe%202008%20elections&st=cse&oref=slogin.

385. See U.N. High Comm'n, *supra* note 373.

386. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.A.).

387. See *id.*

388. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

389. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

390. 42 U.S.C.A. §§ 12101-12102 (West 2008).

Under the first definition, an individual has a disability if she has “physical or mental impairment that substantially limits one or more of the major life activities of such individual.”³⁹¹ In *Toyota*, the U.S. Supreme Court interpreted two key terms in this definition, “substantially limits” and “major life activities.” Specifically, the Court construed “substantially limits” to mean “prevents or severely restricts.”³⁹² The Amendments reject the *Toyota* interpretation as “an inappropriately high level of limitation necessary to obtain coverage under the ADA,”³⁹³ and the Amendments instruct courts to interpret “substantially limits” consistently with the findings and purposes of the Amendments.³⁹⁴

The U.S. Supreme Court also interpreted “major life activities” as “activities of central importance to most people’s daily lives.”³⁹⁵ This narrow interpretation has led to some counterintuitive results. In fact, Congress noted a lower court finding that a plaintiff with stage three breast cancer does not have a disability because the disease did not substantially limit the plaintiff’s ability to perform the major life activities of caring for herself, sleeping, or concentrating.³⁹⁶ To prevent illogical outcomes, the Amendments provide a non-exhaustive list of major life activities, including caring for self, sleeping, and concentrating.³⁹⁷

Lower courts have also had difficulty determining whether some diseases substantially limit a major life activity when the major life activity is a bodily function. For example, courts have struggled to analyze whether bodily functions like reproduction or liver function are of central importance to most people’s daily lives.³⁹⁸ To address this issue, the Amendments regard major bodily functions as major life activities and provide a non-exhaustive list of major bodily functions including reproductive and digestive functions.³⁹⁹

In addition, the Supreme Court decided whether disability should be determined with or without reference to mitigating measures. In *Sutton*, the court held that the plain language of the ADA requires courts to consider mitigating measures in determining whether an individual has an impairment that substantially limits a major life activity.⁴⁰⁰ Because Congress wants to avoid penalizing those who have developed adaptive strategies to deal with their disabilities,⁴⁰¹ the Amendments instruct courts to disregard the ameliorative

391. § 12102(a)(1)(A).

392. See *Toyota Motor*, 534 U.S. 198 (2002) (“We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”).

393. § 12101(b)(5).

394. § 12101(a)(4)(b).

395. *Toyota Motor*, *supra* note 389 at 198.

396. See H.R. Rep. No. 110-730, pt. 1, at 13 (2008) (citing *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002)).

397. 42 U.S.C.A. § 12102(a)(2)(A).

398. H.R. Rep. No. 110-730, pt. 1, at 13 (2008) (citing *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1080 (W.D. Wis. 1998) (analyzing whether a five-year old’s ability to reproduce is limited by his HIV infection)); *Id.* (citing *Furnish v. SVT Sys., Inc.*, 270 F. 3d 445, 450 (7th Cir. 2001) (finding “an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function—unlike eating, working, or reproducing—is not integral to ‘ones daily existence’”)).

399. § 12102(a)(2)(B).

400. *Sutton v. United Airlines, Inc.*, 527 U.S. 482-89.

401. H.R. Rep. No. 110-730, pt. 1, at 12 (2008). See also H.R. Rep. No. 110-730, pt. 2 at 8. “A multitude of people who manage their disabilities effectively through medication, prosthetics, hearing aids, or other ‘mitigating measures’ are viewed as too functional—or not ‘disabled enough’—to be protected under the ADA.” *Id.* (internal citation omitted). “It seems to me that the last message we would want to send to Americans with

effects of mitigating measures such as medication, prosthetic limbs, and hearing aids, among other examples in the provision's non-exhaustive list.⁴⁰²

To limit the reach of this provision, the Amendments explicitly exclude ordinary eyeglasses and contact lenses, the mitigating measure at issue in *Sutton*,⁴⁰³ but the Amendments ban the use of "qualification standards, employment tests, or other selection criteria based on uncorrected vision unless" they are shown "to be job-related for the position in question and consistent with business necessity."⁴⁰⁴

Under the third definition of disability, an individual has a disability if she is "being regarded as having such an impairment."⁴⁰⁵ Because of the phrase "such an impairment" the Supreme Court in *Sutton* incorporated the first definition by reference and held that the third definition is met by establishing that the physical or mental impairment that the individual is regarded as having substantially limits one or more of the major life activities of such individual.⁴⁰⁶ The Amendments reject the *Sutton* approach and explain that the test is met by establishing that an individual was subjected to a prohibited action because of an actual or perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity."⁴⁰⁷

This interpretation raises concerns that the Amendments will cause the ADA to be abused by or cause resources to be wasted on individuals with minor ailments that last a short period of time, like the cold or the flu.⁴⁰⁸ The Amendments address these concerns in a few ways. The Amendments "exclude impairments that are transitory and minor," and define transitory impairment as "an impairment with an actual or expected duration of six months or less."⁴⁰⁹ The Amendments also provide that entities need not provide a reasonable accommodation to an individual who meets the definition of disability solely under the third definition of disability.⁴¹⁰

Finally, in keeping with Congress' desire to restore the ADA's broad scope of protection, the Amendments ban discrimination against a qualified individual "on the basis of disability,"⁴¹¹ instead of banning discrimination against a qualified individual "with a disability because of the disability of such individual."⁴¹² Congress changed the language to reemphasize to the courts that "the critical inquiry" in disability discrimination cases is whether an individual has been discriminated against on the basis of disability - not the

disabilities—particularly youth with disabilities and returning war veterans—is the less you manage your disability, the less you try, the more likely you are to be protected under civil rights laws. *Id.* (internal citation omitted).

402. 42 U.S.C.A. § 12102(a)(4)(E)(i)(I)-(IV).

403. 42 U.S.C.A. § 12102(a)(4)(E)(ii).

404. 42 U.S.C.A. § 12113(c) (West 2008).

405. 42 U.S.C.A. § 12102(a)(1)(C).

406. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

407. § 12102(a)(3)(A).

408. H.R. Rep. No. 110-730, pt. 1, at 14 (2008).

409. 42 U.S.C.A. § 12102(a)(3)(B).

410. *Id.* at § 6(h).

411. P.L. 110-325 § 4(a)(3)(B) (2008).

412. 42 U.S.C. § 12112(a) (2006).

preliminary question of whether an individual has a disability and is, therefore, entitled to ADA protection.”⁴¹³

XXIII. South Ossetia

On August 26, 2008, Russia announced its recognition of the independence of a Georgian breakaway province, South Ossetia, following a Russian-Georgian military clash in the region.⁴¹⁴ While the United States and all major E.U. countries condemned the Russian move, the situation begged a number of questions including: whether Georgia fulfilled its obligations to protect Ossetians and other minorities within its territory; whether any violations led to the conflict of August 7, 2008; and whether the people of South Ossetia could successfully claim self-determination, as a minority right, to become independent.

Georgia's international law obligations⁴¹⁵ include protecting minorities⁴¹⁶ and affording them the full opportunity to enjoy fundamental freedoms.⁴¹⁷ Although a number of drafts have been discussed, Georgia has not yet adopted a law on national minorities. This omission may have led to the outbreak of conflict in South Ossetia in August 2008.⁴¹⁸ An NGO report of 2008 noted that Georgia should consider the idea of “protecting national minorities” as one possible approach.⁴¹⁹ Georgia has failed to protect its minorities' rights, including the rights to non-discrimination, education, participation and religion and linguistic rights.⁴²⁰ As of October 2008, the European Court of Human Rights had received 2,729 applications from South Ossetians in connection with the intervention of Georgian armed forces in August.⁴²¹

413. H.R. Rep. No. 110-730, pt. 1 at 16 (2008). See also, P.L. 110-325 § 2(b)(5) (2008) (“[T]he primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations . . . whether an individual's impairment is a disability under the ADA should not demand extensive analysis.”).

414. See *Russia-Georgia Conflict in South Ossetia: Context and Implications for U.S. Interests*, CRS Report for Congress (Sept. 22, 2008) [hereinafter CRS Report for Congress].

415. Georgia is a member of the Council of Europe and is a party to some of the major international law documents including the ICCPR, ICESCR as well as the Framework Convention for the Protection of National Minorities.

416. HRC reiterated that Article 27 of the ICCPR extends to all individuals within the jurisdiction of the state. Human Rights Committee General Comment 23/50, 1994 at Article 27 ICCPR, ¶¶ 5.1 & 5.2.

417. Organization for Security and Cooperation in Europe, Helsinki Final Act of 1975, available at <http://www.secrecon.org/region/sp/helsinki.htm>.

418. Minority Rights Group International: Georgia: Georgia Overview, Governance, <http://www.minorityrights.org/1909/georgia/georgia-overview.html#governance>.

419. Alternative NGO Report, On the Implementation by Georgia of the Framework Convention for the Protection of National Minorities in the Region of Kvemo Kartli (Georgia), Tolerance, Public Association for Human Rights Protection, 2008, ¶ 6.

420. See Themes of Minority Rights, <http://www.minorityrights.org/1285/themes/themes.html> (last visited Oct. 28, 2008).

421. Complaints include alleged violations of Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the European Convention on Human Rights and by article 1 of Protocol No. 1 (protection of property) to the Convention. Press Release, European Court of Human Rights, 2,700 Applications Received by Court from South Ossetians against Georgia (Oct. 10, 2008).

Ossetians did not have the right to create an independent state. Succession, or full territorial independence, is generally considered to be an extreme form of self-determination a pertinent right that has been extended to some minorities. The right was enshrined in the U.N. Charter and further included in international law treaties as a right of "peoples."⁴²² The concept has evolved to potentially give minorities the "internal" right to allow "people" broader control over their political, economic, social, and cultural development.⁴²³

Since the breakdown of the USSR, the Russian Federation has extended citizenship and passports to most ethnic Ossetians living in Georgia.⁴²⁴ In August 2008, when the Russian Federation recognized the independence of South Ossetia, the rest of the international community condemned because it violated fundamental principles of sovereignty and territorial integrity.⁴²⁵ Georgia agreed with the international community⁴²⁶ and filed an inter-State application with the European Court of Human Rights against the Russian Federation. The primary consideration for the U.N. has been the reaffirmation of all Member States to the sovereignty, independence, and territorial integrity of Georgia within its internationally recognized borders.⁴²⁷

XXIV. Guantánamo Bay Detainees

On June 12, 2008, the U.S. Supreme Court issued its decision in *Boumediene v. Bush*⁴²⁸ reversing the U.S. Court of Appeals for the D.C. Circuit which held that Section 7 of the Military Commissions Act (MCA)⁴²⁹ stripped federal courts of jurisdiction to hear habeas petitions filed by Guantánamo Bay detainees and that petitioners had no rights under the U.S. Constitution.⁴³⁰ Justice Kennedy's majority decision concluded that the MCA operates as an unconstitutional suspension of the writ of habeas corpus and that Combatant Status Review Tribunals (CSRTs)⁴³¹ are an insufficient substitute for habeas review.

The Court emphasized the historical importance of the habeas corpus writ in upholding the separation of powers but concluded that an historical analysis of the writ provides no definitive answer as to whether Guantánamo Bay detainees have habeas rights. The Court rejected the government's argument that Cuba is sovereign over Guantánamo Bay,

422. See International Covenant on Civil and Political Rights, U.N., Dec. 16, 1966, 999 U.N.T.S. 171, Art.1; International Covenant on Economic, Social, and Cultural Rights, U.N., Dec. 16, 1966, 993 U.N.T.S. 3, Art. 1.

423. See generally Minority Rights Group International, <http://www.minorityrights.org/2813/themes/self-determination.html>.

424. See CRS Report for Congress, *supra* note 414.

425. Press Release, OSCE, OSCE Chairman Condemns Russia's Recognition of South Ossetia, Abkhazia Independence (Aug. 26, 2008), available at www.osce.org/item/32667.html.

426. See The Secretary-General, *Report*, ¶ 9, U.N. Doc. S/2008/480. Georgia also instituted proceedings at the International Court of Justice against Russia for alleged violations of CERD in August 2008. See Press Release, ICJ, Georgia Institutes Proceedings Against Russia for Violations of the Convention on the Elimination of all Forms of Racial Discrimination (Aug. 12, 2008) <http://www.icj-cij.org/docket/files/140/14659.pdf>.

427. S.C. Res. 1808, S/RES/1808 (Apr. 15, 2008).

428. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

429. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C. (2006)).

430. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

431. The Department of Defense established CSRTs to determine whether individuals detained at Guantánamo Bay are enemy combatants.

thereby depriving the Court of habeas jurisdiction, and stated that such a conclusion would allow the “political branches [to] switch the Constitution on or off at will.”⁴³² The Court has habeas jurisdiction over Guantánamo Bay because the United States exercises de facto sovereignty based on its “objective degree of control” over the territory.⁴³³

The Court concluded that Section 7 of the MCA is an unconstitutional suspension of the writ of habeas corpus because CSRTs fail to uphold the detainees’ habeas corpus rights. CSRTs fall short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the Court did not detail what would constitute an adequate habeas substitute, it criticized the inability of detainees in CSRTs to rebut evidence that they are enemy combatants.

Chief Justice Roberts’ dissent⁴³⁴ accused the majority of shifting foreign policy and national security decisions away from the elected branches to the judiciary, and argued that the CSRT process complies with the requirements of *Hamdi v. Rumsfeld*⁴³⁵ and that petitioners should have sought preliminary review in the D.C. Circuit and exhausted their remedies under the MCA. Justice Scalia’s separate dissent⁴³⁶ accused the majority of “manipulation” of the territorial reach of the writ to areas not under U.S. sovereignty and emphasized the limited rights of aliens held abroad. In support of his claim that “[t]he Nation will live to regret what the Court has done today,” Justice Scalia cited instances where released detainees have reentered the battlefield and perpetrated acts of terrorism.⁴³⁷ On October 7, 2008, the U.S. District Court for the District of Columbia issued an order in *Kiyemba v. Bush*⁴³⁸ calling on the U.S. government to release seventeen prisoners held at Guantánamo Bay who were not enemy combatants.⁴³⁹ No third-party country was willing to accept the Uighurs, and U.S. policy did not permit their return to China due to humanitarian concerns. On October 20, 2008, the United States Court of Appeals for the D.C. Circuit issued a stay⁴⁴⁰ of the District Court’s order, and the Court of Appeals heard oral argument on November 24, 2008.

XXV. Tortious Compensation in China

The General Private Law of China (GPLC) and the Product Quality Law (PQL) provide for a private right of action for injured consumers.⁴⁴¹ The 2002 Standing Committee Discussion Draft Tort Code⁴⁴² and the three predominant alternative drafts offer clearer language on the right of the individual to seek compensation directly from a defective

432. *Boumediene*, 467 F.3d at 2259.

433. *Id.* at 2252.

434. *Id.* at 2279-93.

435. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detailing the due process rights of U.S. citizens detained as enemy combatants).

436. *Boumediene*, 467 F.3d at 2293-2307.

437. *Id.*

438. *Kiyemba v. Bush*, 2008 WL 4898963 (D.D.C. Oct. 7, 2008).

439. Although a CSRT had ruled that the men were “enemy combatants,” the Court of Appeals for the D.C. Circuit concluded that the government’s evidence was unreliable.

440. *Kiyemba v. Bush*, Nos. 08-5424-29, 2008 WL 4898963 (D.C. Cir. Oct. 20, 2008).

441. PQL Art. 40, GPCL Arts. 106, 117-121, 128-131.

442. See George Conk, *People’s Republic of China Civil Code (Draft), Chapter 8: Tort Liability Law*, 30 FORDHAM INT’L L.J. 955, Art. 37 (2002) (translated in 2007).

product's seller and manufacturer.⁴⁴³ However, the deluge of defective product injuries in China in 2008 revealed a distinct gap between the inked right of action to pursue compensation and the right as it existed in practice.

From suspect blood products to defective toys to tainted dog food, the inadequacy of product control was apparent throughout 2008.⁴⁴⁴ One of the most notorious was the melamine tragedy in which a chemical used in the creation of plastic and fertilizer in milk powder products caused kidney disease in tens of thousands of infants (and an unknown number of deaths).⁴⁴⁵

After initial denial,⁴⁴⁶ China accepted responsibility for regulatory laxities and inconsistencies that led to the melamine tragedy.⁴⁴⁷ But rather than facilitate individuals' right to sue the sellers of faulty products, the government became judge, compensator, and punisher. It vowed to punish the wrongdoers,⁴⁴⁸ and prosecuted, convicted, and imposed harsh sentences, including executing a top official convicted of accepting bribes to allow defective products on the market.⁴⁴⁹ The government also compensated melamine victims for their medical treatment.

Initially, the government's rapid approach to compensating victims and punishing wrongdoers seemed a fair shake. But the individual right to sue producers was foreclosed by enthusiasm to resolve the problem "effectively and forcefully."⁴⁵⁰ First, the government's legal association may have issued strong recommendations to attorneys to withhold bringing suits.⁴⁵¹ Second, for those individuals who found an attorney, Chinese courts refused to hear a single melamine case, relying on their unlimited discretionary power to reject cases for undisclosed public policy concerns.⁴⁵²

443. George Conk, *A New Tort Code Emerges in China: An Introduction to the Discussion with a Translation of Chapter 8—Tort Liability, of the Official Discussion Draft of the Proposed Revised Civil Code of the People's Republic of China*, 30 FORDHAM INT'L L.J. 935, 947-952 (2007).

444. See David Barboza & Walt Bogdanich, *China Shuts 3 Companies Over Safety of Products*, N.Y. TIMES, July 8, 2007, <http://www.nytimes.com/2007/07/08/world/asia/08china.html>; see also Toni Johnson, *China's Troubled Food and Drug Trade*, Council on Foreign Relations (Oct. 17, 2008), <http://www.cfr.org/publication/17545/> (last viewed on Nov. 3, 2008).

445. Jim Yardley & David Barboza, *Despite Warnings, China's Regulators Failed to Stop Tainted Milk*, N.Y. TIMES, Sept. 27, 2008, <http://www.nytimes.com/2008/09/27/world/asia/27milk.html>.

446. Staff of House Subcommittee on Oversight and Investigations, *Food from China: Can we Import Safely 5* (Oct. 4 2007), http://energycommerce.house.gov/Press_110/110-rpt.100407.ChinaTripReport.pdf; see also Howard French, *As China's Economy Roars, Consumers Lack Defenders*, N.Y. TIMES, July 8, 2007, <http://www.nytimes.com/2007/07/08/world/asia/08china.html>.

447. Government of China, *China's Cabinet Lays Groundwork For "Clean-up," Recovery of Dairy Industry*, Oct. 6, 2008, http://english.gov.cn/2008-10/06/content_1113305.htm.

448. Government of China, *Chinese Premier Vows to Enhance Food Supervision Following Milk Powder Scandal*, Oct. 25, 2008, http://english.gov.cn/2008-10/25/content_1131113.htm.

449. See, e.g. Government of China, *Six More Detained Amid Tainted Milk Scandal*, Oct. 6, 2008, http://english.gov.cn/2008-10/06/content_1112379.htm; see also Joseph Kahn, *China Executes the Former Head of Its Food and Drug Agency*, INT'L HERALD TRIBUNE, July 10, 2007, available at <http://www.ihf.com/articles/2007/07/10/news/china.php>.

450. Government of China, *Chinese Premier Vows to Enhance Food Supervision Following Milk Powder Scandal*, Oct. 25, 2008, http://english.gov.cn/2008-10/25/content_1131113.htm.

451. See Jim Yardley, *More Candy From China, Tainted, Is in U.S.*, N.Y. TIMES, Oct. 1, 2008, available at http://www.nytimes.com/2008/10/02/world/asia/02milk.html?_r=1&oref=slogin.

452. "A Great Danger for Lawyers" New Regulatory Concerns on Lawyers Representing Protestors, HUMAN RIGHTS WATCH, Vol. 18, No. 15(c) 18, Dec. 2006; see also Peter Ford, *What China's Tainted Milk may Not Bring: Lawsuits*, THE CHRISTIAN SCIENCE MONITOR, Sept. 22, 2008, <http://www.csmonitor.com/>

XXVI. International Criminal Court

A. BASHIR INDICTMENT

On July 14, 2008, International Criminal Court Chief Prosecutor Luis Moreno-Ocampo filed a warrant application for the arrest of Sudan's President Omar Hassan Ahmed al Bashir, accusing him of crimes against humanity, war crimes, and genocide in Sudan's western Darfur province.⁴⁵³ The application alleged that Bashir exercised "absolute control" over a military and paramilitary campaign aimed at three ethnic groups—the Fur, Masalit, and Zaghawa tribes—whom he viewed as insufficiently supportive of his regime and who shared the same "ethnicity" as the rebel groups that have since 2003 challenged the government.⁴⁵⁴ Bashir's government sponsored attacks by the "janjaweed" militia against Darfur's civilians and launched aerial bombardment campaigns and helicopter gunship attacks against them.⁴⁵⁵ The Prosecutor made clear that evidence of systematic violence against women and girls would play a key role in the case, and that "rape is an integral part of the pattern of destruction [being inflicted] . . . upon the targeted groups in Darfur."⁴⁵⁶ If the ICC's Pre-Trial Chamber determines that the evidence summary presented in the Prosecutor's application establishes "reasonable grounds to believe" that Bashir committed the alleged crimes, it will issue a warrant for his arrest.⁴⁵⁷ In October 2008, the Chamber requested "additional supporting materials."⁴⁵⁸

The indictment of Bashir marked the fourth in the Darfur atrocities that have claimed over 250,000 lives. The Prosecutor's Office indicted Ahmed Haroun, a Sudanese minister, and Ali Kosheib, an allied militia leader, for war crimes. In 2008, Mr. Moreno-Ocampo requested arrest warrants for rebels accused of killing twelve African Union peacekeepers in September 2007.⁴⁵⁹ The Bashir indictment marks a high-water point for the ICC because it is the first request to arrest a sitting president, and, should the Chamber confirm the Prosecutor's charges, it will be the Court's first genocide indictment. Because the U.N. Security Council referred the situation in Darfur to the ICC for investi-

2008/0923/p01s01-woap.html; see also Dan Slater, *China's Milk Fiasco Yields Lawsuit—In China*, WALL ST. J., Oct. 1, 2008, available at <http://blogs.wsj.com/law/2008/10/01/chinas-milk-fiasco-yields-lawsuit-in-china/> (this article notes that one suit was officially filed with the courts; however, it is to be seen whether the court will dismiss it within its discretionary powers).

453. *Situation in Darfur, Sudan*, Summary of Prosecutor's Application Under Article 58, ICC-02/05-152, Pre-Trial Chamber I, July 14, 2008 [hereinafter *Darfur Prosecutor Application 2008*]; *ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur*, ICC Press Release, ICC-OTP-20080714-PR341-ENG, July 14, 2008.

454. *Darfur Prosecutor Application 2008*, *supra* note 453 ¶¶ 39-60.

455. *Id.* ¶ 14.

456. *Id.* ¶ 28.

457. Rome Statute, *supra* note 158, at art. 58 (adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and entered into force July 1, 2002).

458. *Situation in Darfur, Sudan*, Decision Requesting Additional Supporting Materials in relation to the Prosecution's Request for a Warrant of Arrest against Omar Hassan al Bashir, ICC-02/05-160 (Pre-Trial Chamber I, Oct. 15, 2008).

459. *Situation in Darfur, Sudan*, Prosecutor's Application Under Article 58(7), ICC-02/05-56, (Pre-Trial Chamber I, Feb. 27, 2007) and *Situation in Darfur, Sudan*, Prosecutor's Application under Article 58, ICC-02/05-162 (Pre-Trial Chamber I, Nov. 20, 2008).

gation in March 2005, the referral obliges U.N. member states (even those, like Sudan, that have not ratified the Rome Statute) to cooperate with the Court.⁴⁶⁰

The Brussels-based International Crisis Group stated that the indictment poses “[m]ajor risks for the fragile peace and security environment in Sudan, with a real chance of greatly increasing the suffering of very large numbers of its people.”⁴⁶¹ In September 2008, the African Union’s Peace and Security Council called on the U.N. Security Council to suspend the Bashir investigation because it threatened international peace and security.⁴⁶² The Security Council’s authority to suspend an ICC investigation can only be invoked with a two-thirds vote of the Council, including concurrence of all five permanent members, making the likelihood remote.⁴⁶³

B. DEFINITION OF AGGRESSION

The Statute of the International Criminal Court⁴⁶⁴ limits the International Criminal Court (ICC) jurisdiction “to the most serious crimes of concern to the international community as a whole.”⁴⁶⁵ This list includes the crime of aggression. However, the definition of aggression was deferred until the First Review Conference of the Assembly of States Parties, scheduled to take place in 2009.⁴⁶⁶

Aside from political concerns, the complexity of the crime of aggression lies its bifurcated nature: for an individual to be held accountable for the crime of aggression there must first be a state act of aggression. What constitutes an act of aggression has been highly controversial; it is, in essence, “a contemporary answer to the historic debate over what constitutes an illegal or unjust war.”⁴⁶⁷ Much of the debate has focused on whether the broad description contained in U.N. General Assembly Resolution 3314 on the Definition of Aggression⁴⁶⁸—which was criticized by the International Law Commission, powerful States, and well-known scholars⁴⁶⁹—is an appropriate basis for defining the act of aggression.

The Chairman’s 2008 Paper suggested that only “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations” would be punishable. This would ensure that armed interventions of a humanitarian character or in furtherance of Charter goals (e.g., the NATO intervention in Kosovo) could not be prosecuted as aggression. Regarding individual conduct that would constitute aggression, the Chairman’s 2008 Paper indicated that a wide range of conduct would be criminalized so long as it was undertaken by a person who was clearly in a

460. S.C. Res. 1593, ¶ 2, U.N.Doc. S/RES/1593 (March 31, 2005).

461. Press Release, International Crisis Group, *New ICC Prosecution: Opportunities and Risks for Peace in Sudan* (July 14, 2008), www.crisisgroup.org/home/index.cfm?id=5572.

462. Press Release, Human Rights Watch, African Union: Don’t Trade Away Justice in Darfur (Sept. 22, 2008), www.hrw.org/en/news/2008/09/22/african-union-don-t-trade-away-justice-darfur.

463. Rome Statute, *supra* note 158, art. 16.

464. Rome Statute, *supra* note 158.

465. *Id.* art. 5(1).

466. *Id.* arts. 112, 121, 123.

467. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L. J. 161, 175 (2008).

468. G.A. Res. 3314, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

469. See Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT’L L. REV. 1 (Winter 2001).

leadership position. Thus, article 8*bis* proposed by the Chairman would provide that aggression “means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression.”⁴⁷⁰

Highly politically divisive issues include which organ of the U.N. should decide whether a State act of aggression occurred and how such a determination would trigger ICC jurisdiction. The Chairman’s 2008 Paper included several alternatives: (1) the Security Council would be the only U.N. organ authorized to decide that a State act of aggression has occurred, and the ICC Prosecutor cannot initiate action unless the Council makes such a finding or authorizes him to proceed; (2) the Security Council would have the “first bite at the apple” and if it fails to act within a specified period of time, the ICC Prosecutor could move forward on his own authority or after review by an ICC Trial Chamber; or (3) if the Security Council fails to act within a specified period, another UN organ—either the U.N. General Assembly or the International Court of Justice—would determine if there was an act of aggression. There was consensus in the Aggression Working Group that due process required any initial determination to be subject to challenge by the defendant at trial.⁴⁷¹

XXVII. Corporate Accountability

In June 2008, Professor John Ruggie, Special Rapporteur on Business and Human Rights, presented his report, ‘Protect, Respect and Remedy’ to the Human Rights Council in Geneva.⁴⁷² He described a new conceptual framework for business accountability for human rights based on three pillars: first, the duty to *protect* human rights on the part of states; second, the duty to *respect* human rights on the part of corporations; and, third, the right to an effective *remedy* to all affected by corporate involvement in human rights violations.

Professor Ruggie recommended governments “support and strengthen market pressures on companies to respect rights,”⁴⁷³ fostering a corporate culture of respect for human rights. He stressed the need for domestic policy alignment, noting that human rights commitments taken by States at the highest level are frequently not observed at policy level, particularly where foreign investment is concerned. He suggested that international human rights bodies and agreements such as the OECD Guidelines should play a greater part in encouraging domestic coherence.⁴⁷⁴

470. ICC, *Discussion Paper on the Crime of Aggression Proposed by the Chairman (revision June 2008)*, Assembly of State Parties, New York, June 2-6, 2008, U.N. Doc. ICC-ASP/6/SWGCA/2 (May 14, 2008).

471. See ICC, *Report of the Special Working Group on the Crime of Aggression*, Assembly of States Parties, Nov. 30 to Dec. 14, 2007, U.N. Doc. ICC-ASP/6/SWGCA/1 (Dec. 13, 2007).

472. John Ruggie, U.N. Human Rights Council, *A Framework for Business and Human Rights: Protect, Respect and Remedy*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/8/5 (2008) [hereinafter *Protect, Respect and Remedy*].

473. *Id.* ¶¶ 29, 30.

474. *OECD Guidelines for Multinational Enterprises*, Ministerial Booklet, OECD (June 2000) [hereinafter *Guidelines for Multinational Enterprises*].

Corporations must have an independent duty to “do no harm.”⁴⁷⁵ While corporations may not necessarily be obliged to advance human rights, their activities must not have any detrimental effect on the rights of others. Many businesses do not have procedures in place to assess their impact upon human rights.⁴⁷⁶ Professor Ruggie therefore employed the notion of due diligence, which indicates the procedures businesses should take in order to avoid complicity in human rights violations.⁴⁷⁷ If an investment is in a conflict zone, the corporation must take steps to prevent the human rights abuses. Companies must recognize the human rights impact of their own activities on employees, customers, and those living nearby. Companies must also consider “whether they might contribute to abuses through the relationships connected to their activities.”⁴⁷⁸

Professor Ruggie concentrated mostly on non-judicial remedies.⁴⁷⁹ The OECD Guidelines for Multinational Enterprises have a grievance mechanism through a system of National Contact Points (NCPs). Although the system has great potential as a remedy, Professor Ruggie concluded that such systems “too often fail to meet this potential.”⁴⁸⁰ Problems include Guidelines’ brief references to human rights⁴⁸¹ and the large variation in NCPs structures from country to country.⁴⁸² NCPs can be anything from a single government official undertaking the role as one of her many duties (as in Ireland) or a panel of independent experts supported by a government secretariat (as in the Netherlands).⁴⁸³

The OECD has used the notion of “functional equivalence,” whereby all NCPs must adhere to core principles such as transparency and accountability.⁴⁸⁴ But Prof. Ruggie found that “many NCP processes appear to come up short when measured against the minimum principles”⁴⁸⁵ for non-judicial grievance mechanisms. The U.N. Human Rights Council extended Professor Ruggie’s mandate for three years.⁴⁸⁶

475. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 24.

476. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 25.

477. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 25.

478. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 57.

479. *Protect, Respect and Remedy*, *supra* note 472, at ¶¶ 92–101.

480. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 98.

481. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 65.

482. John Ruggie, Keynote Presentation at the Annual Meeting of National Contact Points, OECD, Paris (June 24, 2008).

483. Working Group of the Investment Committee, *Review of NCP Performance: Key Findings*, OECD (June 4, 2008) DAF/INV/WP(2008)1/FINAL.

484. *Guidelines for Multinational Enterprises*, *supra* note 474, at 58.

485. *Protect, Respect and Remedy*, *supra* note 472, at ¶ 98.

486. U.N. Human Rights Council, *Resolution of the Human Rights Council on the Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 8th Session, A/HRC/RES/8/7 (June 18, 2008), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf (last visited Nov. 23, 2008).

XXVIII. Tasers

Concern over the use of tasers by law enforcement officers may also present an international human rights issue,⁴⁸⁷ and U.S. courts have faced questions concerning the constitutionality of tasers.⁴⁸⁸

487. University of Houston Center for Public Policy, *A Statistical Analysis of the Use of Conducted Energy Devices by the Houston Police Department Part III*, (2008), <http://www.houstontx.gov/controller/audit/Conducted%20Energy%20Device%20Program%209.8.2008/PART%20III%20University%20of%20Houston%20Center%20for%20Public%20Policy.pdf>; See also John Morgan, Medical Panel Issues Interim Findings on Stun Gun Safety, 261 Nat'l Inst. of Just., 2008, at 20, 20, <http://www.ncjrs.gov/pdffiles1/nij/224083.pdf>.

488. For cases discussing the constitutionality of Tasers, see *Zivojinovich v. Barner*, 525 F.3d 1059 (11th Cir. 2008); *Johnson v. City of Lincoln Park*, 434 F. Supp. 2d 467 (E.D. Mich. 2006); *McNally v. Eve*, No. 8:06-CV-2310-T-23EAJ, 2008, U.S. Dist. LEXIS 36144 (M.D. Fla. May 2, 2008).

